OPERATIONS OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR)

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION AND CLAIMS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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OPERATIONS OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR)

WEDNESDAY, FEBRUARY 6, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2 p.m., in Room 2237, Rayburn House Office Building, Hon. George W. Gekas [Chairman of the Subcommittee] presiding.

Mr. GEKAS. [Presiding.] The hour of 2 o'clock having arrived, the Committee will come to order.

I saw my counterpart, Sheila Jackson Lee, here just a moment ago. The rule of the House, and, therefore, the rule of the Committee, is that no hearing can be held until two Members of the Committee present themselves. And now we note that the gentleman from Detroit, Michigan, has walked into his accustomed place as a Member of the Committee. And, thus, we are in order. Two Members having appeared, we can begin the proceedings.

As most of you are already aware, the Attorney General today, just hours ago, announced the intended promulgation of a regulation or sets of regulations to restructure the Board of Immigration Appeals and several structures appertaining thereto, so this hearing is very timely. It will give us an opportunity to overlay the Attorney General's proposals to the existing structure and then to be able to take your testimony and append it thereto.

As a matter of fact, I was just telling counsel that we may take an unusual step by asking the Committee to approve our forwarding of the entire body of testimony, including your statements, to the Federal Register as it comes time for commentary on the proposed rules changes on the part of the Attorney General. I don't know if that's ever been done before, but we're going to do it.

This will then act as a supporting base of data for whatever the final determination might be. Even those comments that you will present that might seem condemnatory of what the General has promulgated or intends to, those will be added; that will be very helpful in the entire body of commentary that we know will come forth as this process moves forward.

Does the gentleman from Michigan wish to make an opening statement?

Mr. CONYERS. Yes, sir. I have a comment. Has the Chair made his? Has the Chair made his statement?

Mr. GEKAS. Yes, I—what I've just said——

Mr. CONYERS. You've gone already. Okay.

Mr. GEKAS [continuing]. Was very important, but—— [Laughter.]

Mr. CONYERS. Of course it was.

Mr. GEKAS. But you may proceed——

Mr. CONYERS. I defy anyone to——

Mr. GEKAS [continuing]. Notwithstanding.

Mr. CONYERS. I defy anyone to suggest the contrary. I would defend my Subcommittee Chair—for at least a little while. [Laughter.]

Now, I welcome the witnesses. Witnesses, this is a very troubling circumstance that we find ourselves in, isn't it?

Fifty-five thousand case backlog; a proposal that has just come hours—we have an Attorney General issuing a statement from the Department of Justice. I have to believe that this hearing and the release of that document are in no way connected and that these were two independent——

Mr. GEKAS. Would the gentleman yield?

Mr. CONYERS. With pleasure.

Mr. GEKAS. You can bet on that. We did not——

Mr. CONYERS. Okay.

Mr. GEKAS [continuing]. Request such an announcement by the Attorney General, nor did we coordinate this hearing to follow upon his announcement. This was formulated, this hearing, way before we knew that the Attorney General was going to do what he did.

Mr. CONYERS. Well, I'm so happy to hear my Subcommittee Chairman make that public declaration. Now all we have to do is ask the Attorney General if he timed his statement to coordinate with your hearing. Did you ask him—did you ask him about that, too, Mr. Chairman?

Mr. GEKAS. We're going to send him a transcript of this entire proceeding, including your comments.

Mr. CONYERS. Well——

Mr. GEKAS. So he'll have firsthand knowledge of what might come out of this proceeding.

Mr. CONYERS. I'm not worrying what he hears that happened here. I'm far more concerned about whether he may have timed this release, which I'm in the process—I just got a copy of. And I presume it follows about the same thing that we understood would be the basis of the hearing anyway. I've not read it.

But I think it's appropriate that this issue be raised, because somebody would be thinking it if I didn't say it. So now I hope we're all feeling better. We're relieved to know that the Chairman did not coordinate it. We do not know if the Department of Justice coordinated their release, but that's to be resolved at another place, namely over at the Department of Justice.

So I thank you very much for allowing me to make that observation.

Now, let's talk about the subject matter. We're confronted with a proposal that, on immigration appeals claims, in a board composed of 23 administrative judges, that they clear out 55,000 cases in a period of 6 months. Now, I always begin by presuming that the Department of Justice and the people from whom these kinds of ideas come are sober and clear and in their own right mind, and that all of the witnesses are, too. And you are now coming before the Judiciary Committee of the United States of America, the Sub-

committee on Immigration, and are proposing to us that we now, having carried backlogs for years and years and years, now clear them up in a 6-month period and then reduce the number of administrative judges from 23 to 11.

Now, if that is my correct understanding, by the time the 6 months are over, there will be 15,000 more cases in backlog. Only then, you'll have less than half of the number of judges you had before you started.

So what are we to do, aside from scrapping this proposal in its entirety and starting all over again? Well, I'm glad you asked that question, because we have to, distinguished former Chairman and judges and professor, we have to create a screening process on the front end that would separate legitimate meritorious appeals from those from which, at the present point, anybody that loses a case can make an appeal. Well, how would you do that? By creating established criteria by which you begin to examine which cases are clearly being appealed because that right exists—and I leave that criteria to be established by you and the Members of this Committee—but in addition, that we make BIA, once and for all, independent of the Department of Justice.

For God's sake, it's a judicial process. It's not an arm of the prosecutorial agency in the United States government.

And so I would ask you to keep these remarks in mind as you make your testimony here today.

Mr. GEKAS. We thank the gentleman.

Mr. CONYERS. I again welcome you to the hearing. And I thank the Chairman for his indulgence.

Mr. GEKAS. And I thank the gentleman for the statement.

Let the record indicate that the lady from Pennsylvania, Ms. Hart, is present; the gentleman from Texas, Mr. Smith, is present; and now the lady from Texas, Ms. Lee, is here, also should be recorded as present and granted the time now to make an opening statement.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. As you well know, I was in the room preceding the beginning of this hearing, but was very much pleased to be able to greet the young people from one of our outstanding programs that I'd like to introduce, and that is American University's Washington semester program.

So the audience is full, Mr. Chairman, both by the very important matter that is before this Committee, but also because you have some very bright and young stars who are interested in the processes of government. And we welcome them. Delighted Professor Jack——

Mr. GEKAS. If they would rise, we'll give them a standing ovation. [Laughter.] [Applause.]

Ms. JACKSON LEE. And their professor, Jack——

Mr. GEKAS. The professor can stay seated. [Laughter.]

We thank you.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman, for your indulgence. I thank the Ranking Member of the full Committee, Mr. Conyers, for his presence here today.

And I'd like, Mr. Chairman, to submit the entire opening statement that I have. I ask unanimous consent to do so, in the record.

Mr. GEKAS. Without objection.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Good Afternoon, Mr. Chairman. Thank-you for calling this hearing in order to examine the components of the Executive Office for Immigration Review that are tasked with adjudicating immigrant removal cases, the Board of Immigration Appeals (BIA) and the Immigration Courts. This hearing will also examine the backlogs in those tribunals and its recent decisions interpreting and applying various provisions of the Act.

Attorney General Ashcroft has signed off on a proposed ruke that would make procedural reforms at the Board of Immigration Appeals (BIA), including cutting the number of Board Members from the current 19 down to 11. An advanced summary of the proposed regulatory change states that the proposed reforms are intended to the following things: eliminating the backlog of approximately 55,000 cases currently pending before the Board; eliminating delays in the adjudication of administrative appeals; and enhancing the quality of BIA decisions.

However, while the attempt appears admirable and well intentioned on its face, I do have some concerns. The Board of Immigration Appeals, although underneath the umbrella of the Department of Justice remains an "independent" Board, and should be free from politics. If these changes are made, then it should be up to Congress to make sure that immigrants' civil liberties are not curbed and that judges who have ruled in favor of immigrants are not the ones who are weeded out. This would be politically motivated.

Some 30,000 decisions from immigration courts and the Immigration and Naturalization Service are appealed each year. Most experts agree that the majority of cases are decided in the government's favor. It was the Clinton Administration that expanded the number of BIA members from 5 to 21 in 1995, and the Bush administration added two positions. However, the added personnel did not significantly speed up the process. Also, part of this proposal calls for sending certain cases to a single judge instead of the current system of three judge panels. This single judge can arbitraily deny an appeal. Having a single appellate judge serve as screener will effectively remove the ability of a panel to correct an abberant judge. There is nothing in the proposal that permits review of an erroneous decision by a single judge.

I am also concerned about the backlog and am aware that some cases have routinely languished for two years. This proposal would build on procedures put in place in 1999 to allow a single judge to rule on routine matters. Under the proposal, three-judge panels would hear only the most significant cases, including those to clarify ambiguos laws or resolve cases of "major national import."

I agree with the Chairman of the Senate Immigration subcommittee when he says, "These are drastic changes being proposed and we need time to carefully review them." As the Ranking Member of this House subcommittee, I am concerned about the attempt to further reduce an immigrant's right to seek review of his or her case before an appellate judge. I also take seriously the words of Pamela Goldberg, the director of the immigrant-rights clinic at the City University of New York law school, who called this move an "absolute disservice to our system of justice, and the Bush administration is looking for every possible way to minimize the number of non-U.S. citizens in this country."

If scholars and the Chairman of the Senate Immigration subcommittee share my concern, then I think the Administration has a ways to go to get the Congress' support for this proposal. I still question whether these existing backlogs are the result of inefficiency or a lack of resources. I also wonder if eliminating the BIA's de novo factual review will increase dramatically both the number of cases remanded and the number of appeals taken to the federal courts. I also think that an immigrant has a better chance of receiving real due process with a three-judge panel, than one judge deciding his fate at the appellate level.

Finally, The AG's detention campaign has resulted in a number of very serious violations of the rights of people in immigration proceedings, including access to counsel. Secrecy has been excessive. In a number of cases, INS attorneys are using novel legal theories, such as the so-called "mosaic" theory, to deny bond to people against whom there is no evidence of danger or flight risk. Under this theory, intelligence gathering is a sufficient basis for detaining people who the goverment does not even accuse of personal involvement in terrorism. The BIA rejected the mosaic theory in the Al Maktari case, the same individual who later testified before the Senate Judiciary Committee about violations of his rights. What if his appeal had been rubber stamped by a single abberant judge? Immigration Judges and the BIA are there to keep INS honest, not to rubber stamp decisions.

Mr. Chairman, I look forward to hearing from the witnesses.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. And let me share some of my concerns. And I want to thank the witnesses for your presence here today. There's a wide array and a wide diversity of individuals.

Might I, as well, add my consternation with the issuance of a rule making under our very noses when we are obviously having a hearing to determine the propriety, the efficiency, the due process aspects, of limiting or changing the BIA.

First, Mr. Chairman, for the record, I'd like to continue to request consideration by the Justice Department of the matters dealing with Gao Zhan; that is the released Chinese imprisoned professor here that is now back home with her family, that we've asked repeated to address her citizenship concerns. It seems that we have a few accusations or innuendo and other problems that I know that, if the Department of Justice would turn toward being fair to those who are really trying to access legalization fairly, Ms. Zhan's family, husband and wife, are citizens—excuse me, husband and son are citizens of the United States. She suffered great persecution by being kept incarcerated in China for a period of months. She has returned.

Even though we respect the relationships that we're trying to build with China, I would think that we should as well respect citizens of the United States who desire to have their family reunited with them and to achieve the same status they do.

Secondarily, let me say that we seem to be able to have a lot of hearings on precipitous issues. No one would deny that the whole idea of security and safety in the United States is now crucial and important. But I believe that we do ourselves a disservice if we do not have a balanced immigration policy.

We have for many, many months been trying to pass 245(i). We've yet to pass it. It is simply a legislative initiative that would allow for the fair and adequate reunification of family members here already in the United States.

And I believe that segues into my assessment of this hearing. For some reason, since September 11th, we have not been able to define terrorism distinctive from immigration. I truly believe that we must adhere to developing immigration policies that this Nation can live by, and immigration does not equate to terrorism. And thereby, it is both profound and respecting of our own Constitution that we design an immigration policy that helps to achieve the fairness to those who would come to this country seeking refuge from persecution and also come to this country fairly, and deal with those who are not here legally in a way that responds to both the safety of this Nation and, as well, a fair immigration policy.

I would say to you, Mr. Chairman, that dissolving, imploding, a due process procedure, eliminating the ability of a three-judge or three-person panel to address an appeals process of an individual that may be deported, is tearing up the due process of what we have come to respect.

I am very concerned that our Attorney General will take the very tragic nature of the times in which we live, in which all of us are unified behind fighting the horror of terrorism, and, one by one,

day by day, chip away at our respect for the rule of law, due process, and our own Constitution.

Now, some would correct me, Mr. Chairman, and say, "As you well know, immigrants or those who are seeking status are not covered by certain aspects of our Bill of Rights." Let me just simply say, as I conclude, Mr. Chairman, that this hearing should be the crucial oversight as to whether we move to make the determination that the Attorney General has suggested to us. I would have wanted him to engage us more vigorously, even though this is viewed as an administrative rule.

And let me associate myself with Mr. Conyers' call and cry for a separate entity. We cannot function in this country if we're willing, out of fear, to give up the basic tenets of what we believe in, and that is that everyone has a right to access, equal access to justice, and have due process be part of that access.

With that, I yield that balance of my time.

Mr. GEKAS. We thank the lady for the opening remarks.

We now turn to the witnesses. Let me say from the outset that, as you well know, the procedure that we abide by calls for immediate adoption of your written statements by insertion thereof into the record. And then we allot 5 minutes, more or less—I hope less, but more can be accommodated, if necessary—to each of the witnesses, so that we can allow time for examination of the witnesses themselves.

So we begin by a quick introduction of the witnesses. We have with us the Honorable Lauren R. Mathon, a former member of the Board of Immigration Appeals. She was employed by the U.S. Department of Justice in several different capacities from 1986 to 2001. She was made, in 1995, a board member at the Board of Immigration Appeals. Before joining the U.S. Department of Justice, she worked at the Los Angeles County District Attorney's Office as a prosecuting attorney for 10 years. She graduated from the University of California at Berkeley in 1971; law degree from Lewis and Clark in Portland, Oregon, in 1974; master's degree in public administration from USC in 1980.

She is joined at the witness table by the Honorable Michael J. Heilman, a former member of the Board of Immigration Appeals. After graduating from the University of Wisconsin, Judge Heilman served as a naval officer from 1969 to 1972. He then went to law school at the University of Wisconsin and became a Foreign Service Officer with the Department of State in Lebanon and Greece, working in consular, political and refugee affairs for 6 years. Judge Heilman left the State Department to work for the Department of Justice as an attorney at the Board of Immigration Appeals. Subsequently, he became an Associate General Counsel at the Immigration and Naturalization Service, concentrating on appellate litigation, legislation, and refugee and asylum matters. In 1986, he was appointed a member of the Board of Immigration Appeals, where he served until his retirement in 2001.

With him and them is Kevin Rooney, well known to the Committee, Director of the Executive Office for Immigration Review. As the Assistant Attorney General for Administration from 1977 to 1984, Mr. Rooney served as the Department of Justice senior career official under three attorneys general during the Carter and

Reagan Administrations. He left the department to practice law in the Washington, D.C., for 10 years; returned to government to serve as Deputy Director of EOIR in 1995. In 1997 he was named Assistant Director of the Bureau of Prisons, where he served until '99. He then returned as director of EOIR in '99. A graduate of St. Mary's Seminary and University and George Washington University School of Law.

The final witness is Stephen Yale-Loehr, a member of the American Immigration Lawyers Association. Steve has practiced immigration law for 20 years. He's co-author of "Immigration Law and Procedure." He also teaches immigration and refugee law at Cornell Law School as an adjunct professor and is of-counsel at the law firm of True, Walsh & Miller in Ithaca, New York. From 1982 to 1986, Mr. Yale-Loehr practiced international trade and immigration law in Washington, D.C. From 1994 to '96, Mr. Yale-Loehr worked as a nonresident senior associate at the Carnegie Endowment for International Peace in Washington, D.C. After graduating from Cornell, Mr. Yale-Loehr clerked for Chief Justice Howard G. Munson of the U.S. District Court for the Northern District of New York.

We will proceed with the testimony in the order in which the witnesses were introduced. The 5-minute clock will begin ticking as soon as I hit the gavel, and that will be your cue, Judge Mathon.

STATEMENT OF THE HONORABLE LAUREN MATHON, FORMER MEMBER OF THE BOARD OF IMMIGRATION APPEALS, IMMIGRATION JUDGE, AND INS TRIAL ATTORNEY

Judge MATHON. Thank you, Mr. Chairman.

It is an honor to appear before this esteemed Subcommittee to discuss the operations at the Executive Office for Immigration Review. I will discuss a few of the reasons for the Board of Immigration Appeals case backlog, and I will offer possible solutions to address its heavy caseload.

Having worked both as an immigration judge and as a board member, I know how important their work is, and I am truly concerned that the adjudicative process in immigration courts and at the board continue to have integrity and be just and fair to all concerned.

Executive Office for Immigration Review was created within the Department of Justice 20 years ago and has three components: the Office of the Chief Immigration Judge, the Board of Immigration Appeals, and the Office of the Chief Administrative Hearing Officer.

Each of these components adjudicates immigration-related cases. I will direct my testimony to the Board of Immigration Appeals, where I worked for the last 6 years. Everything I say is my personal opinion and does not reflect the opinion of anyone at the Executive Office for Immigration Review, the Department of Justice, or the Social Security Administration, where I now work.

Along with an increase in the number of board members appointed to the board since 1995, the caseload at the board has also dramatically increased. I outlined many of the reasons for this increase in my written testimony. Let me now mention two.

First, fundamental changes in the immigration law in 1996 resulted in extensive litigation at all levels—the immigration court, the board, Federal circuit courts, and the United States Supreme Court. This litigation often required the board and immigration judges to adjudicate a single case two or more times.

Second, internal management difficulties existed at the board from 1995 to 2000. The former Chairman tried to implement and enforce time limits for board members to adjudicate cases and write their separate opinions. But he achieved only limited success and rarely imposed sanctions on offenders.

Before I highlight some of the changes I would recommend to address the board's caseload, let me compliment the board from some of its management initiatives which are working effectively.

The streamlining initiative is one. The streamlining initiative is now formalized by regulation and allows the board to adjudicate noncontroversial cases by a single board member. From it inception in 1999, the streamlining panel has effectively screened all incoming cases for legal issues raised on appeal and adjudicated a large number of cases. Expertly managed and staffed by high-producing and highly competent board members, attorneys, and paralegals, this panel is responsible for a large percentage of the board's overall production.

The jurisdiction panel is another effective management initiative. This panel screens all incoming cases for jurisdictional defects, such as untimely filed appeals and motions, and adjudicates these cases quickly, preserving valuable board resources to adjudicate properly filed appeals and motions.

I applaud the board for these successful management initiatives, and I commend the people who staff these panels for their excellent work.

To address the burgeoning caseload and make board members accountable, I proposed 10 changes in my written testimony. Let me mention four now.

First, the board should promote a uniform standard of review and strive for consistent decisions by individual panels. The board should give deference to credibility and demeanor findings of immigration judges and deference to their exercise of discretion. The board should not, as it now does, abuse its de novo authority to achieve a result when the immigration judge did not err.

Second, the board should be mandated to enforce regulatory time and numerical limitations. The regulatory period for filing an appeal of an immigration judge's decision was increased from 10 days to 30 days in 1996. This was done to provide detained and nondetained aliens and the INS an adequate time to file an appeal. The board addressed this issue in a precedent in 1997 in Matter of J-J-, and held that filing deadlines would be strictly enforced even in detained cases, except under rare and exceptional situations. Yet today, the board ignores its own precedent and ignores the regulations. It flagrantly ignores the 30-day appeal period set forth in the regulations and has adopted a 3-day grace period for late appeals. Ironically, by certifying these late appeals, the board increases its already heavy caseload.

Third, the board should be mandated to consider only those issues raised on appeal. If a party does not raise an issue on ap-

peal, the board should not consider it. Board members should act as judges not as advocates.

Lastly, the board should be mandated to adjudicate decisions within a specific time limit. The time limit can be shorter for cases involving detained aliens but in no case should exceed 180 days.

A specific result should follow if the board does not meet this time limit and cannot show good cause. For example, the immigration judge's decision can be affirmed without opinion.

Please refer to my written testimony for additional changes I propose. I hope that I have given you a few helpful suggestions for how to improve the operations at the Board of Immigration Appeals. The board has an important mission, and I am glad that you are considering different management initiatives in an effort to improve its productivity and at the same time preserve its ability to publish decisions and provide guidance to immigration judges and to the immigration community.

Thank you for this opportunity to appear before the Subcommittee. I look forward to answering any questions you may have.

[The prepared statement of Judge Mathon follows:]

PREPARED STATEMENT OF THE HONORABLE LAUREN R. MATHON

Mr. Chairman, Ranking Member, and Members of the Subcommittee:

It is my pleasure to appear before you to discuss the operations of the Executive Office for Immigration Review. I hope to highlight some of the reasons for the current case backlog at the Board of Immigrations Appeals, to note what current management initiatives are effectively working and to outline my proposed changes for the Board of Immigration Appeals.

I have spent 15 years working in the field of immigration law. I have spent a large portion of my career in this fascinating field of law, and I am truly concerned that the adjudicative process in continue to have integrity and continue to be just and fair to all concerned—to the aliens, to the Immigration and Naturalization Service, to the Attorney General and to the citizens of the United States.

BIA Backlog

The current caseload at the Board of Immigration Appeals is crushing. It receives over 30,000 filings each year and has a backlog of 55,000 cases. The reasons for the backlog and increasing caseload are many.

First, although the number of Board Members was greatly increased in 1994-1995, a large backlog existed at that time.

Second, radical changes in 1996 under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) represented a fundamental change in immigration law. Immigration Judges, the Board, and federal courts have all attempted to interpret these changes. Extensive litigation ensued and often resulted in the Board and Immigration Judges adjudicating the same case twice. The Board is still interpreting the 1996 law, and these issues are still being litigated in federal court. The U.S. Supreme Court ruled on two of these issues last year. Its ruling in *INS v. St. Cyr* (cite) resulted in hundreds, if not thousands, of remands to the Board and to Immigration Judges.

Third, the number of Immigration Judges has greatly expanded to meet its own caseload. I was one of 75 judges when I was appointed in 1987. Today there are over 225 judges. The increase in judges has resulted in an increase in the number of appeals.

Fourth, the Board experienced management difficulties from 1995-2000. For example, the former Chairman tried to implement and enforce time limits for Board Members to adjudicate cases and write their separate opinions and achieved only limited success. He rarely imposed any penalties on offenders.

Fifth, although the number of Board Members greatly expanded over the past few years, four of the Board Members appointed in the last two years had no immigration background or expertise. It took them time to learn a new body of law and be-

come proficient at their work, and during this time the number of cases which could otherwise be reviewed and adjudicated decreased.

Effective Management and Regulatory Initiatives

Three distinct initiatives at the Board have been implemented and are working well.

First, the Streamlining process is a regulatory initiative, and it allows the Board to adjudicate noncontroversial cases by a single Board Member. This specialized panel has dramatically increased the overall production of the Board. Today this panel is responsible for about a third of the overall production. From its inception in 1999, the Streamlining panel has worked effectively to screen all incoming cases for legal issues raised on appeal and adjudicate the noncontroversial cases by a single Board Member. It is staffed by high volume producing and high quality attorneys, paralegals and Board Members, and it is expertly managed by an outstanding supervising attorney.

Second, the Jurisdiction panel effectively and efficiently adjudicates all cases with jurisdictional issues. Each month hundreds of appeals and motions are filed beyond the regulatory time and numerical limits. This panel adjudicates these issues without the necessity of addressing the merits of the cases. Moreover, this panel wrote the BIA Practice Manual, which is a valuable tool for immigration practitioners all over the country.

Third, one of the panels at the Board is specifically devoted to adjudicate backlog cases. It has been successful in making a big dent in the backlog. Rather than spread these cases among all the panels, the decision to allocate specific resources to this task has proved to be a good one.

Proposed Changes

To address the Board's caseload and make Board Members accountable, I would propose these changes:

1. Set specific time limits for the Board to render decisions on all incoming cases. The time limit can be shorter for cases involving detained aliens, but in no case should it be longer than 180 days from the date of receipt of the transcript.
2. Mandate a result if the Board does not meet these time limits. I would propose that the Immigration Judge's decision be affirmed without opinion.
3. Mandate the Board to enforce the regulatory numerical and temporal deadlines for filing appeals and motions. See 8 C.F.R. 3.1 and 3.2 and *Matter of J-J-*, 21 I&N 976 (BIA 1997). The Board should not routinely ignore regulatory filing deadlines, as it is now doing, nor should it ignore the numerical limits for motions to reopen and motions to reconsider.
4. Mandate the Board to consider only those issues raised on appeal. The Board should not raise issues on behalf of a party, if the party did not raise these issues on appeal.
5. Set a short and specific time limit for a Board Member to write a separate opinion or dissent. Enforce a sanction if the Board Member does not comply. For example, if a Board Member votes to dissent, the Board Member should have a 3-week period to prepare a written dissent. If he or she fails to do so within that time period, the decision of the majority should be made and distributed without the Board Member's full dissent.
6. Reduce the number of Board Members to a total of 16, 15 Board Members and Chairman. Create 5 BIA panels and assign 3 Board Members to each panel.
7. Hire more paralegals to help screen all incoming cases for potential adjudication by Streamlining panel and to write decisions in noncontroversial cases. Hire more attorneys to help write decisions.
8. Add more categories of cases for adjudication by a single Board Member on the Streamlining panel. Set up a task force to propose additional categories.
9. Set a goal to complete adjudication of the backlog. The Board has successfully adjudicated the backlogs of 1992-1994, and it should continue to allocate some of its resources full time to this project.
10. Promote consistency of decisions among the panels. One of the missions of the Board is to provide a uniform interpretation and application of immigration laws. Different panels at the Board should not reach opposite conclusions in cases with similar fact patterns or similar legal issues. Results should not routinely depend on the particular composition of Board Members on the panel. The Board should have a uniform standard of review and

should not routinely invoke its authority to conduct de novo review when it seeks to achieve a particular result. *See Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994).

Thank you for this opportunity to appear before the Subcommittee. I would be pleased to answer any questions you may have.

Mr. GEKAS. We thank the lady.

The floor has a vote pending, and, therefore—we believe it is only one vote. We will recess this Committee and reconvene at 20 of 3 o'clock. We stand in recess.

[Recess.]

Mr. GEKAS. The hour of 2:40 having arrived, the Committee will come to order.

We note the presence of a hearing quorum, again, in the person of the Ranking minority Member of the Judiciary Committee, Mr. Conyers, and the Chair.

Before we proceed with the second witness, I want to complement the introduction of the students from the American University with an introduction of our own of the junior class participants in a visit to Washington from Elizabethtown High School in central Pennsylvania. Will they please stand so we can applaud your presence here? [Applause.]

You can sit down. There won't be any pictures taken. [Laughter.]

We will proceed with the second witness, Mr. Heilman.

STATEMENT OF THE HONORABLE MICHAEL HEILMAN, FORMER MEMBER OF THE BOARD OF IMMIGRATION APPEALS

Judge HEILMAN. Thank you very much, Mr. Chairman.

I will be brief, if I can be. You have my written testimony, which goes into the situation at the Board of Immigration Appeals, as I see it, and also touches upon the role of the immigration judges as I have seen them operating from some 20 years.

I would prefer to offer you some points from consideration. Some of them are suggestions, and some are observations.

I hope you can hear me. I have something of a flu.

Mr. GEKAS. You're good.

Judge HEILMAN. Am I doing all right? Thank you.

The first thing I'd like to say is that there's been, consistently, for many years, a focus on the output of the decided cases by the Board of Immigration Appeals. I find that that is probably a trap. And I think that it would be much more valuable for those in the Department of Justice and on this Committee when considering what's happened with the board and its backlog to start addressing ways to limit the number of appeals that are fed into the process and also to work out a system by which those appeals which are not meritorious could be dropped out of the system as quickly as possible.

I have offered for your consideration a number of suggestions based on other appeals boards, which have worked in the past. One of them, very briefly, is to set a time limit for the cases that appear before the board to be decided. I suggested 120 days. And if they aren't decided within that time, the decision of the immigration judge would stand.

Another possibility would be to require the persons who file the appeals to file a statement of jurisdiction with the board and ask

for the appeal to be considered by leave of the board. For a number of years, an appeal to the Board of Immigration Appeals has been considered a matter of right. I do not think that it is a matter of right under general principles of administrative law. There is no constitutional or statutory right to an appeal to the Board of Immigration Appeals. The right that exists is that which exists through regulation.

The next point I'd like to make is that very few appeals to the Board of Immigration Appeals from immigration judges' decisions actually involve the question of deportability or removability. And that, I think, is probably one of the prime concerns that Members of your Committee would have, and also the Department of Justice, in deciding whether or not to limit appeals. What exactly is it that the board is being asked to look at if the great majority of aliens who appear before the immigration judges have conceded deportability and then are simply seeking some form of relief from removability or deportability?

A corollary point to this is that most of the time spent by the immigration judges and the board on the cases that they see is spent on relief from deportation. And in recent years——

Mr. GEKAS. What was that? On what?

Judge HEILMAN. On relief from deportation.

Mr. GEKAS. Oh, all right.

Judge HEILMAN. I'm sorry. Am I fading out?

Mr. GEKAS. No, no, no.

Judge HEILMAN. Okay.

Mr. GEKAS. My ears are fading. [Laughter.]

Judge HEILMAN. All right.

This is meant, to a great extent, in the last 5 to 6 years, applications for asylum and then, more recently, applications made under the convention against torture.

I don't know that one needs to get into any more detail on that at this point, but I think that in looking at whether or not the board and judges are being used effectively, one should look at what it is that they're being asked to consider.

I would only briefly mention that the convention against torture in this country is pretty uniquely considered a form of relief from deportation. Australia and Canada, to my knowledge, are the only other two countries that treat it as such. In other countries, it's treated as an exceptional remedy.

I would also like to add my observation, and this is based on having reviewed probably close to 100,000 cases. It's hard to believe—over a 15-year period. But I think that that's pretty accurate.

I think the immigration judges get the vast majority of their decisions correct. And I have to really ask myself, and I think other should ask themselves, what exactly it is that the board is correcting, if the vast majority of the decisions of the immigration judges are correct to begin with.

It seems to follow from this, if you accept my observations and my premises, that any system with common sense would focus on the initial hearing stage and would put its resources there and make sure that the hearings that are conducted at that level are those that will get the result that should be received under the immigration laws.

I think that it's clear at this point that the Board of Immigration Appeals has too many members. I also will have to admit that I was caught somewhat by surprise by the recent proposal. I think it offers 11 members; I propose, in my written testimony, 9 members. I think that's too many; probably 11 is too many.

I think also that the board needs to reorient itself back to its precedent-setting role. The board has become an adjunct to the administrative hearing process. By that I mean, it's seen as sort of another step in the immigration judge process. It really shouldn't do that. It should be the one that's interpreting and setting precedents. It should decide individual cases only clearly where there's legal or factual error.

I offer, in my written testimony, two other proposals which also relate to the Immigration Service, one of which is I think the misuse of the asylum officers. Presently, if an application for asylum is denied by an asylum officer, that person may apply for asylum again before an immigration judge. I think that's a misuse of their resources, both the asylum officer and the immigration judge.

The other thing that I think that really ought to be looked at is some kind of review of the cases that are presented to the immigration judges. Fifteen to 20 different categories of immigration officers may initiate proceedings with the immigration judges without any review by a legal system.

And I just want to stop right there.

[The prepared statement of Mr. Heilman follows:]

PREPARED STATEMENT OF MICHAEL J. HEILMAN

The hearing today will focus on the functions of, and issues relating to, the Board of Immigration Appeals (BIA), and Immigration Judges (IJ's), located administratively with the Executive Office for Immigration Review. My comments and suggestions, will, I hope, highlight those matters that would be of interest to you in your oversight of these Department of Justice components. My observations and suggestions derive from my almost 3 decades of experience dealing with immigration matters at the Board of Immigration Appeals, the Immigration and Naturalization Service and the Department of State.

As the backlog of pending appeals at the BIA has been a concern both in- and outside of the BIA for a number of years, I would like to begin with that subject. It cannot be over-emphasized that this backlog of pending cases is not some elemental force of nature. The backlog is a product of policy choices made primarily within the Department of Justice, usually at the EOIR level. The backlog can be reduced to a reasonable level. But before I offer my suggestions for reform of the hearing and appeal process, I would like to offer some background as to the processes and procedures that characterize the work of the BIA and the IJ's.

BACKGROUND

To begin, it should be understood that at neither the hearing before an IJ, nor on the appellate level before the BIA, is deportability generally at issue. Deportability is almost always conceded at the outset of the hearing or easily established by the submission of documentary evidence by the Immigration and Naturalization Service (INS). Commonly, not only is deportability conceded, but the alien also concedes that no relief from deportability is available to him and he agrees to voluntary departure.

In those hearings where the alien does not wish to leave the U.S., even after deportability has been established, the issue addressed is that of eligibility for relief from deportation. In such contested hearings, relief from deportation is the only matter of interest to the alien other than release on bond. In recent years, this has meant as a practical matter that the alien wishing to avoid removal applies for asylum and for deferral of removal under the provisions of the Convention Against Torture. Applications for relief, not issues of deportability, consume the time of the Im-

migration Judge at the hearing level, and subsequently, the time of the BIA if an appeal is taken.

In considering changes at the hearing and appeals level, then it should be understood that we are not considering matters that underlie the fundamental question of whether the alien is deportable. The present system from beginning to end seldom gets into that subject as a matter of dispute. To the alien who wishes to remain in the U.S., the single subject of importance is whether he can benefit from any statutorily provided method to legalize his status or suspend the effect of the deportation order.

This makes sense, because in the vast majority of cases, lacking a claim to U.S. citizenship or permanent resident status, the vast majority of aliens in the removal process have either illegally crossed the U.S. border, or overstayed or violated the conditions of their nonimmigrant visa. They know that they have done this.

The concerns you may have regarding the nature of immigration proceedings should not center so much on procedures for establishing deportability, but rather on procedures and processes for claiming benefits that can be made under the immigration law to trump the consequences of the aliens' otherwise easily determined illegal presence. This means, in turn, that the focus of changes at both the hearing and appeals levels should zero in on relief from removability, as well as on asylum and withholding of deportation and the Convention Against Torture.

Another important point that needs to be emphasized is that contrary to what is commonly asserted, there is nothing particularly complicated about the administrative hearing process or the appeal process. The hearing process begins with the service of a notice of intent to remove, which states the grounds for removal and informs the alien of his rights in the process. The alien appears before an Immigration Judge who again tells the alien what his rights are and who explains the charges. The Immigration Judge then asks the alien to plead to the charges. If, as is usually the case, the alien concedes deportability, the Immigration Judge explores the possibility of relief or voluntary departure. The alien is usually the only person who appears, other than his attorney and the INS attorney. There is commonly no need for witnesses relating to the charge of deportability. Usually, if deportability is contested by the alien, it is established by simple questioning on the part of the Immigration Judge or the submission of a report of investigation by INS. The whole hearing is carried out on the record, and Immigration Judges take care to follow required procedures, which insure that a person lawfully in the U.S. will not be run over roughshod and unlawfully removed.

I would like to make one further observation in regard to the administrative hearing process. This observation is based on my years of experience working on the appellate level and with consular and refugee programs. Many people are quite convinced that the average alien in removal proceedings is simple-minded, ignorant and bewildered by his situation. I think this view mischaracterizes completely the typical alien who has made his way to the U.S. Aliens who come to the U.S. are a self-selected group with initiative and a certain amount of resourcefulness and daring. They have by and large figured out the immigration system and understandably wish to work it to their own advantage. They are persons who have had the sense to assess their life and opportunities in their own country and have decided that life in the U.S. is preferable. They are not persons who are easily bowled over by the immigration laws and processes of this country. Many are indeed students of the immigration system's weaknesses and opportunities. If they lose out in the end, in the sense that they cannot make a case for receiving an immigration benefit, it is certainly much more likely that this is so because they simply do not qualify, not because they have been victimized or have fallen through the cracks.

ADMINISTRATIVE HEARING AND APPEAL PROCESS

With that background, I would like to shift over to some points relevant to the two major aspects of the immigration removal process, the administrative hearing before the Immigration Judge and the appeal process before the BIA.

First, the role of the Immigration Judge is unequivocally paramount in any quantitative or qualitative sense. The Immigration Judges hear and finally decide about 85% of all cases that are brought by INS in removal hearings. This 85% figure represents the historical percentage of all the cases that are brought to a hearing. This means, for purposes of illustration, that if INS brings 200,000 aliens into proceedings in a given year, the Immigration Judges will issue a final decision in 170,000 of those cases. The remaining 15 % represents the historical percentage of cases where the alien files an appeal once the Immigration Judge enters a decision. This final decision by the Immigration Judge will contain a ruling on deportability and eligibility for relief if that was sought, and an order of removal, and usually

an alternate order of voluntary departure, the latter order usually giving the alien 30 to 90 days to depart at his own expense.

I reviewed over 100,000 appeals over a 15-year period at the BIA. I would state without hesitation that the overwhelming percentage of Immigration Judge decisions that I reviewed were legally and factually correct, and that the subsequent appeals were without any substantial basis on any ground. Again, the important point here is that in considering changes in the immigration process as a whole, it is the Immigration Judges who issue final decisions and orders in a huge percentage of the cases brought. If one accepts my proposition that the Immigration Judges issue the correct decision in almost all of the cases they hear, most certainly on the issue of deportability, then any effort to reform or change the administrative hearing and appeals process should take this factor in to account when allocating resources and personnel.

As to the second part of the administrative process, the appellate review carried out by the BIA, that function can be stated in simple terms: it is to consider any appeal brought for any reason by an alien or INS. I will pass over appeals filed by INS because they constitute less than 1% of the total filed at the BIA. The BIA, as noted, receives appeals in about 15% of the cases decided by the Immigration Judges. This means that as the number of cases filed with the Immigration Judges increases so does the number of appeals filed with the BIA.

As an initial question, one can fairly ask why, if the BIA dismisses the great percentage of appeals it receives, about 85% or more, what incentive is there for the typical alien to appeal from an Immigration Judge's decision? One part of the answer lies in the fact that the appeal filing fee is very low, $110, with that fee being waived by the BIA in about 50% of the appeals, oftentimes even where an alien is represented by an attorney. The alien is not charged for copies of the record or for the transcript of the hearing, which often exceeds 50 pages. All of these costs are absorbed by EOIR. By contrast, to my knowledge, no-cost appeals on a civil level are a rarity.

Of course, the answer as to why an alien appeals to the BIA lies less in the merits of the case, than in the effect the filing of the appeal has on the removal process. The filing of the appeal with the BIA suspends the effect of the Immigration Judge's order. The Immigration Judge's order is still final, but it cannot be enforced until the BIA decides the appeal. This fact is well-known and probably is the single greatest incentive for an alien to appeal.

Once the appeal is received at the BIA it is set into an administrative processing stage that is about as abbreviated as it can realistically get. The BIA Clerk's Office is inundated with appeals and paper and tries to deal with a volume of appeal forms and related papers that would probably sink most administrative offices. Within the blizzard of paper they receive, they manage to set briefing schedules and enter the files into the tracking system. There is very little that can be done in this part of the process that would have any appreciable beneficial effect on the amount of time an appeal sits at the BIA. Plans the BIA has to dispense with "paper" files and records are commendable but have no chance of meaningful implementation in the foreseeable future.

Once the Clerk's Office is finished with its business, the case is assigned to a staff attorney, and follows one of two tracks: a regular case assignment or a "streamlining" track. The "streamlined" cases are those appeals that fall within the category of cases that BIA Members have agreed may be subjected to an abbreviated, and one hopes, faster, review. Such "streamlined" cases include those where the sole issue on appeal is an issue already decided and controlled by BIA or federal court binding precedent. These "streamlined" cases are assigned to specified staff attorneys for disposition with model draft decisions.

Once the staff attorney drafts a proposed decision, the record and decision go to a panel of 3–4 BIA Members. The BIA has 5–6 designated panels which receive draft decisions from staff attorneys assigned to that panel. In the past 2–3 years, the "streamlining" panel has considered an ever-growing number and percentage of the cases decided by the BIA, almost as many as the other regular panels combined. For a variety of reasons, the productivity of the regular BIA panels has varied widely over time, and it seems clear that if the "streamlining" panel did not exist the backlog of undecided appeals would be substantially greater.

You will, I am sure, have heard that the "streamlining" panel is the major focus of the BIA in grappling with its caseload. Its work is to be commended in this regard, but it should also be kept in mind that there were similar approaches to this "streamlining" panel tried in the past, which went under other names, such as the "intake" panel. Those panels, and other specialized panels which dealt with certain defined categories of cases, also were highly productive, but the backlog still grew and grew in the past 20 years.

Growth has also characterized the BIA as an institution, to the point that it bears no real resemblance to the body that was known as the BIA for about the first 50 years of its existence. In 1986, when I was appointed to the BIA, there were 5 Members and about 25 staff attorneys. Now there are about 20 Members and over 100 staff attorneys, and an enormously larger administrative staff in addition.

But while one can focus on the numbers of appeals decided or undecided, and do interesting analyses of cases decided per BIA employee, focus on this subject to the exclusion of other matters would be a trap. Historically, the BIA has had two functions, that of deciding individual cases, which is what EOIR and the Department of Justice fixate on, and that of issuing precedent decisions for guidance to the INS and Immigration Judges. BIA precedent-setting historically has also played a major role in consideration of immigration cases on the federal court level. This is so because the BIA has been the voice through which the Attorney General has spoken regarding interpretation of the immigration laws, and under long-standing U.S. Supreme Court precedent in turn, has been accorded deference.

This precedent-setting function of the BIA can be lost sight of, and arguably has been lost sight of, in recent years. If the BIA existed in a vacuum, or if it existed only to issue precedent decisions for its internal use, this matter of precedent decisions would not be so important. Precedent decisions, however, were intended to be used outside the BIA by all parties and federal agencies involved in the administration of the immigration laws. This function was designed to insure a uniform application of the immigration laws on a nationwide basis. While one can look at the precedent decisions of the BIA issued in the last several years, and remark on the volume of pages alone as refuting any argument that the precedent decision function has been lost in the fixation on case numbers, the fact of the matter is that the page volume is more an indicator of the current verbosity of the BIA than its precedent-decision making qualities. There has been a huge increase in the number and length of the separate and dissenting opinions, and a corollary drop in the utility of the majority decisions as precedents for who are supposed to use and apply them, and that includes the BIA itself. Many majority decisions read as legal treatises and serve more as platforms for internal BIA disputes than as vehicles for useful interpretations by the BIA's audience.

It was inevitable that the ability of the BIA to issue precedent decisions, to say nothing of useful precedent decisions, would be lowered as the number of Board Members increased. This development was either not understood or was a matter of no concern to the Department of Justice. The major concern the department had in increasing the number of Members was in increasing the number of appeals decided. The simple equation applied was that more Members would equal more cases decided, which was more or less the result, without regard to output per Member, which has varied greatly.

The effect of this equation on the precedent writing portion of the BIA's function seems not to have been considered. Leaving aside differences in legal interpretations and legal philosophies of individual Members, the BIA also came to be marked by internal divisions based on personality conflicts. The tone and language used in BIA decisions began to display the differences among the Members and display a coarseness of spirit. This change in the content of the precedent decisions was also evidenced in panel decisions and internal divisions within panels mirrored those found at the BIA as whole. An understandably jaundiced view of the quality and value of the BIA came to be possessed by those who read the decisions. This was particularly true on the part of many Immigration Judges, who came to see their decisions being subjected to intemperate and even personal critiques by certain BIA Members. Panels began to issue conflicting decisions and the number of cases remanded to the Immigration Judges increased significantly. Many Immigration Judges came to believe that their decisions were not being subjected to a reasonable review, but rather the whims of individual Members.

To an extent not previously seen during the BIA's prior 50-year history, the BIA began to experience intervention by the Department of Justice, often invited to do so by INS, and one suspects, other branches of the Department of Justice involved in immigration litigation and policy-making. The Attorney General began to certify to her office BIA decisions that had been brought to her attention, in order to review BIA decisions. While this intervention may have been well-intended and necessary in certain cases, it was also often ill-advised and detrimental to the administration of the immigration laws and the BIA's role. As one example, one might point to the debacle that occurred when at the behest of INS, the Attorney General certified for her review issues arising under the waiver of deportation provisions under the former section 212(c) of the Immigration and Nationality Act. The end result was years of litigation, thousands of BIA and Immigration Judge decisions in limbo, and

the ultimate reconsideration of thousands of those cases to no good purpose, because the laws had changed in the interim.

While events such as these were unfolding, there were substantial changes in the immigration laws in 1996 and thereafter that demanded the BIA's attention. Such matters as the retroactivity and applicability of the new laws to pending cases and to aliens already served with notices to appear in deportation proceedings required the BIA's interpretation and resolution. These matters proved exceedingly difficult for the BIA to address, again, because of the size of the BIA and the disparate viewpoints of its Members. Even where a majority for a particular outcome exists in a body this size, it is often the case that the reasons for the outcome may differ from Member to Member. Writing a decision that can coherently take different views into account can be very difficult. The number of Members was also continuously being increased during this time, and so issues apparently resolved one month had a way of becoming unresolved as new votes and new voting patterns appeared. In a nutshell, what happened was that the BIA increasingly was deciding cases in a time warp, trying to decide appeals filed years before the changes in the law, while Immigration Judges and INS were trying to deal with new case filings under the new laws. This state of affairs also affected the BIA internally, as staff attorneys had difficulty deciphering the BIA's own majority position on any given subject. BIA panels more and more often issued decisions that varied widely in interpretation of the laws and outcome, as well as decisions that showed different views of the BIA's role as an appellate body.

This is the backdrop against which the BIA and the Immigration Judges operate today. This situation need not continue as it is. It is a result of policy choices made intentionally and by default, and they can be unmade for the better.

The BIA is presently viewed within the Department of Justice and certainly by policy makers within EOIR as more of an administrative benefits agency, rather than as a quasi-judicial administrative appellate body, which it had been at its inception. While the BIA should be setting legal directions for those involved in the administrative hearing process, deciding issues of significance, it has become more of an adjunct of the administrative hearing process, where an alien unhappy with the outcome of the hearing below may ask, at no cost, for a readjudication of his case. By accepting all appeals, and more recently by issuing panel decisions in which the BIA has given the impression that it may nullify those portions of the immigration laws which certain Members disagree with, and by continuing to have a large pending appeal backlog, the BIA invites appeals, and it is logical to assume that aliens will be happy to continue to file appeals in large, if not increasing numbers.

In my view, approaching this situation as if a large caseload of appeals is a given and that the only way to deal with it is to appoint yet more BIA Members and staff attorneys, will insure that the system as presently constituted will ultimately collapse of its own weight. There are, however, ways to help the BIA and the Immigration Judges to do the best what they have historically done best.

SUGGESTIONS FOR CHANGE

In the case of the BIA, the first step in the right direction would be a shift by the Department of Justice away from the view that the BIA's caseload can only be addressed at the rear end of the process. This means shifting from a focus on the output of decided appeals and attempts to tinker with the present processes to somehow increase efficiency, to a focus on means of reducing the input of appeals to the BIA. The BIA does not need to accord an appeal forum to every alien who is put in proceedings and who chooses to appeal. The BIA's primary purpose should be to consider cases on a precedential level and those where a clear case has been made that an Immigration Judge has made an incorrect application of the law below.

This approach, where an appeal would not be of right, but rather by leave of the BIA, would focus BIA resources on those appeals where an alien could plausibly argue on appeal that an Immigration Judge has misapplied law or precedent, not those cases where the alien is simply dissatisfied with the result below and knows that an appeal will gain him time in the U.S. This approach would take into account several factors, the first being that there are, and properly so, many more Immigration Judges than Board Members. Secondly, that the Immigration Judges get the vast majority of their decision correct, legally and factually. It only makes common sense to aim for a system where the decision making process begins and ends as near the opening stage of the process as possible. It is one thing for the BIA to be deciding issues of legal interpretation, what a statute means, for instance, and quite another for it to simply be substituting its judgment on matters such as the reason-

able interpretation of evidence by, or exercise of discretion by, an Immigration Judge. There is a world of difference between an incorrect decision and a decision that a Board Member would like to change because it suits an individual Member's particular view of the world.

Offered for your consideration are the following suggestions for change:

1(a). Require the alien to file a brief within 30 days of filing the appeal in which he would be required in an opening jurisdictional statement to identify any legal errors committed by the Immigration Judge, with a statement of and citation to, legal precedent to back the assertions. An inadequate statement of legal error would result in dismissal of the appeal.

1(b). As an alternative to the above, or as a corollary change, set by regulation or statute a time limit within which the BIA would have to render a decision on the merits of the appeal, perhaps 120 days. If a decision is not rendered within this time, the Immigration Judge's decision will become the final decision and can be enforced.

Both of these suggestions, alone or in tandem, recognize that the Immigration Judges are the persons who can best deal with and do deal with the lion's share of the immigration proceedings caseload.

2. A further step would be to reduce the number of Board Members to no more than 9. The evidence is plain that a large number of Members simply do not improve the appellate process qualitatively. The evidence to the contrary is much stronger based on the experience of the last several years. The phenomenon of factions and conflicting opinions is not surprising, if one looks to other judicial bodies with large numbers of judges. This reduction in the number of Members would be consistent with a commensurate reduction in appeals to the BIA.

3. A third, and less significant change would be to charge the appealing alien with the cost of the appeal. There are significant expenses absorbed by the Department of Justice because it foots the bill for the appeal process. As a rule, in civil proceedings, which the immigration proceedings have been seen to constitute, the appealing party pays the cost of the appeal, including the transcript. The fact that any particular individual might be unable to bear this cost has not deterred this general practice in civil proceedings.

4. A fourth suggestion would free up Immigration Judge resources. This change would abolish the present practice by which an alien may have an asylum application heard by both an INS asylum officer and an Immigration Judge. Present regulations allow an alien whose asylum application has been denied by an asylum officer to receive a new hearing before an Immigration Judge. This makes no sense, if the asylum officer's decision to grant asylum is accepted at face value, then the decision to deny should be given equal weight.

5. A fifth suggestion for change is to have cases screened by INS attorneys before a notice to appear in removal proceedings may be filed with an Immigration Judge. Under the present regulatory system, about a dozen different categories of INS officers may begin removal proceedings. This is done without regard to the Immigration Judges' or the INS trial attorneys' caseload, the legal sufficiency of the notice issued, or any present or future ability or intention on the part of the INS district office to enforce any removal order issued by an Immigration Judge. The present system is akin to a police officer or tax assessor being able to issue an indictment without the approval or involvement of a prosecutor or states attorney. A change of this nature might result in a more rational and systematic approach to enforcement of the immigration laws.

The suggested changes outlined above could potentially address some of the basic weaknesses of the present administrative/appellate process. Other persons who appear before you may well have reform proposals of equal or greater appeal. I am certain, though that attempting to reform the present system around the edges and to alleviate the problems that are evident by spending more money on more personnel and more equipment is to engage in a futile exercise.

Mr. GEKAS. Perhaps some of the questions will allow you flesh out the answers.

Judge HEILMAN. I actually have finished at this point. Thank you.

Mr. GEKAS. Let the record indicate that the gentleman from California, Mr. Issa, has joined the Committee.

And we turn now to Mr. Rooney.

STATEMENT OF KEVIN ROONEY, DIRECTOR, EXECUTIVE OFFICE OF IMMIGRATION APPEALS

Mr. ROONEY. Thank you, Mr. Chairman, Ms. Jackson Lee, Mr. Conyers, Members of the Subcommittee.

Mr. GEKAS. Excuse me. I did not note that the lady from California, Ms. Lofgren, is here as well.

Mr. ROONEY. I'm pleased to testify this afternoon about the activities of the Executive Office for Immigration Review, EOIR, particularly the Board of Immigration Appeals and the Nation's immigration courts.

I also look forward to discussing several planned initiatives designed to increase efficiency in adjudications while preserving fairness to all parties in immigration proceedings.

These, Mr. Chairman, are the issues that were discussed earlier today by the Attorney General.

The immigration hearing process has experienced an enormous in case volume. Over the last 5 years an average of over 271,000 cases have been filed in the immigration courts each year. Prior to 1997, the average was 180,000 per year.

The Board of Immigration Appeals has seen its annual caseload increase from an average of 11,500 cases in fiscal years '85 through '94 to an average of 27,600 cases in fiscal years '95 through 2001.

Against this background, the immigration courts have continued to complete the great number of case adjudications in a timely manner. At the appellate level, however, we have experienced great difficulty in keeping pace with the caseload, even though an average of over 25,000 cases have been completed in the past 5 years, with 31,000 completed last year.

As of the end of fiscal year 2001, however, there are approximately 56,000 cases pending at the Board of Immigration Appeals. The Department of Justice has recently developed broad procedural reforms to address the backlog at the Board. This reform will assist us in eliminating the backlog of cases that has accrued due to the unprecedented increase in the number of appellate matters and the resultant delays in adjudicating cases.

The department's proposals expand upon the BIA's successful streamlining case initiative. Under the current streamlining process, certain types of appeals are decided by a single board member rather than by a standard three-member panel.

Streamlining contributed to a 50 percent increase in overall Board productivity in fiscal year 2001. An independent audit recently concluded that those aliens whose cases were streamlined were no more or less likely to be represented by counsel and that streamlining did not result in any appreciable difference in the ultimate outcome of a case.

Under the proposed new regulations, all appellate cases will be sent to a screening panel where single board members will exercise the authority of the Board—not different authority, but the authority of the Board—and issue a decision or determine if a case is appropriate for review by a three-member panel.

The great majority of cases that the Board receives are straightforward and present no difficult issues. These cases will be adjudicated by single board members serving on the screening panel. Five categories of cases, however, will qualify for three-member re-

view. Three-member panels will be used first to resolve inconsistencies among different immigration judges; secondly, to clarify ambiguity in the immigration law; third, to correct any clearly erroneous factual determinations by an immigration judge; fourth, to correct an immigration judge decision that is plainly not in conformity with the law; and, five, to resolve cases involving matters of national import.

In short, this reform will allow the Board to utilize its resources more efficiently. Instead of spending the time and resources of three-member panels on cases that are relatively simple, where there are no major issues raised, the Board will be able to focus the attention of three-member panels on the tough cases that present difficult questions or require a more searching inquiry into the decision below.

With respect to the standard of a review applied by the Board, the new regulations bring the Board into conformity with appellate courts throughout America. The rules will allow the Board to review only legal questions de novo, while factual determinations are to be reviewed under the clearly erroneous standard. This reflects the long-standing judicial principle that factual determinations are best made by a judge who is present when the testimony is given, not by someone else reading a transcript months later.

Only if the immigration judge's factual determinations are clearly erroneous will the Board disrupt those findings. The Board will remand all such cases back to the immigration judges.

The proposed regulations will also establish reasonable deadlines for the completion of cases, from the filing of the appeal through the issuance of a final administrative order from the Board. These measures are designed to prevent the unacceptable delays that have occurred in the past.

More than 10,000 cases currently pending before the Board are over 3 years old. This delay of justice contributes to an unfair enforcement of our immigration laws and does not help the alien with a strong legal basis for his appeal who seeks justice from the Board. In fact, it allows persons illegally in the United States to acquire additional equities and to abuse the immigration system.

Finally, let me turn to the size of the Board, and I'll be very quick, Mr. Chairman.

Beginning in '95, the department has incrementally increased the number of board members from 5 to 23 with no appreciable impact upon the annual completion of cases. The problem of the backlog was not solved by adding board members. It was fundamentally a problem of procedure and the need for staff to support the additional board members.

The proposed rule establishes board membership at 11 to provide for both single-member and three-member panel review. The efficiencies resulting from these initiatives can eliminate delay and uncertainty in the immigration adjudication process. They will also allow the Board to concentrate its resources on those cases that most require them.

I thank you again, Mr. Chairman, for the opportunity, and I will be pleased to answer any questions.

[The prepared statement of Mr. Rooney follows:]

PREPARED STATEMENT OF KEVIN D. ROONEY

Mr. Chairman, Ranking Member Jackson Lee, and Members of the Subcommittee:

It is my pleasure to appear before you to discuss the functions, organization, and case processing systems of the Executive Office for Immigration Review (EOIR).

EOIR was established in 1983 when the Department of Justice (Department) created the Office of the Chief Immigration Judge and its Immigration Courts and combined this function with the existing Board of Immigration Appeals (Board). EOIR is an administrative hearing tribunal, which presides over both trial and appellate immigration cases throughout the United States. Prior to the creation of EOIR, the initial hearing function had been performed by special inquiry officers at INS. The functional move of cases from INS to EOIR was to ensure impartiality in the immigration adjudication context by having cases decided by a different entity than the one that prosecuted them.

In 1987, a third component, the Office of the Chief Administrative Hearing Officer (OCAHO), was added to EOIR. Administrative Law Judges within OCAHO interpret the laws sanctioning the hiring of illegal aliens, immigration-related employment discrimination and immigration-related document fraud.

EOIR's primary function is to provide a uniform interpretation and application of immigration law, through an adjudication process involving individual cases, and to provide due process and fair treatment to all parties involved.

THE THREE EOIR COMPONENTS AND THEIR MISSIONS

Office of the Chief Immigration Judge and the Immigration Courts:

The Chief Immigration Judge provides overall program direction, articulates policy, and establishes priorities for the Immigration Judges. The Immigration Courts are comprised of 211 Immigration Judges in 51 Immigration Courts throughout the United States, with 18 of the 51 Immigration Courts located in either detention centers or prisons. Additionally, Immigration Judges travel to over 100 other hearing locations to conduct proceedings. In FY1984, there were approximately 127,000 matters brought before the Immigration Judges. In FY 2001, EOIR's Immigration Judges received over 284,000 matters.

Immigration Judges preside over ten types of hearings. The most common hearing is a removal hearing, in which INS charges that an alien is unlawfully in the United States and should be removed. However, while almost all hearings include the issue of removability, the outcome of many of these hearings does not turn on this issue, but rather on the issue of relief from removal. Even if an alien is removable, he or she may file an application for relief from removal, such as asylum, voluntary departure, suspension of deportation, cancellation of removal, adjustment of status, registry or a waiver of inadmissibility. Immigration Judges are experts in the many and varied issues of immigration law, and are often called upon to determine such complex issues as derivative citizenship claims or interpretation of state or federal criminal laws as they relate to immigration.

Immigration Judges also preside over bond redetermination hearings. Bond redeterminations are held when an alien in custody seeks release on his or her own recognizance, or a reduction in the amount of bond imposed by the INS. Immigration Judges completed over 30,000 bond hearings in FY 2001. On October 31, 2001, the Department issued a regulation modifying the bond determination rules to provide for an automatic stay of an Immigration Judge's decision ordering the release of an alien where the INS had set a bond of at least $10,000, or determined that the alien should not be released. The INS must request this automatic stay and the stay is in effect for ten days. In that period, the INS must appeal the Immigration Judge's decision to the Board or the stay lapses. If the Board upholds the Immigration Judge's decision, another automatic stay arises for five days for the INS to determine if it wishes to refer the Board's decision to the Attorney General. The stay terminates if no referral to the Attorney General is made. If the appeal is made, the stay remains in effect until the Attorney General makes a decision on the appeal.

One of the most significant activities our judges perform is providing removal hearings for aliens convicted of criminal offenses who are incarcerated in prisons across the United States. Our judges travel to 44 states (and Puerto Rico) and 72 prisons on regular details. EOIR has coordinated the implementation of expanded programs with the INS to ensure the optimal placement of resources based upon the volume and geographic concentration of detained, asylum, and criminal alien workload.

The Institutional Hearing Program (IHP) provides the framework for hearings that determine the immigration status of aliens convicted of criminal offenses who are incarcerated in prisons across the United States. For FY 2001, the Immigration Courts completed 10,989 IHP cases. In concert with the INS, EOIR has concentrated

on the Federal prison system and those in the seven states most affected by illegal immigration: California, Texas, New York, Florida, Arizona, New Jersey, and Illinois. There are also programs in virtually all other states, the District of Columbia, Puerto Rico, the Virgin Islands, and selected municipalities. The seven state programs, known collectively as the Enhanced IHP, account for the vast majority of the state program caseload, as well as that of the total IHP. Consequently, Enhanced IHP is a central component of a variety of initiatives designed to expedite the removal of criminal aliens who are found removable from the United States. This involves close coordination with INS, the Federal Bureau of Prisons, and state and local correctional authorities.

In the aftermath of the tragic events of September 11th, the Office of the Chief Immigration Judge has implemented new procedures in handling special security cases. In order to protect the privacy of the alien and the witnesses, certain special security cases have been closed to the public. Immigration Judges have always had the authority to close cases under section 3.27 of Title VIII of the Code of the Federal Regulations. Immigration Judges may close hearings for the purpose of protecting witnesses, parties or the public interest. Additionally, the Board and the OCIJ have adopted interim measures to accommodate persons whose business with the Board or with the Immigration Courts in New York City was affected by the terrorist attacks on September 11, 2001.

To enhance the implementation of the asylum reforms, EOIR expanded the number of Immigration Judges in many courts and established several new courts. EOIR's computer system has been modified to facilitate the implementation of asylum reform by enhancing case tracking capabilities and by allowing several INS asylum offices limited access to the system. INS personnel can now access the Automated Nationwide System for Immigration Review (ANSIR) system and schedule cases for Immigration Judge hearings immediately upon their decision to refer the denial of an application for asylum to EOIR. INS regional service centers can access the ANSIR database and ascertain the status of cases to determine an alien's eligibility for employment authorization. This interactive scheduling system is available to INS nationwide for all case types.

EOIR has also been active in the regulatory area, publishing regulations that include provisions allowing the use of stipulated removals, thereby enabling the expedited removal of criminal aliens in applicable cases. Regulations also authorize the Immigration Judges to conduct telephonic hearings as well as video electronic hearings, which are particularly effective in providing hearings in remote detention settings.

The Board of Immigration Appeals:

The Board was established over 60 years ago to ensure uniformity and a national standard. Under the direction of the Chairman, the Board hears appeals of decisions of Immigration Judges and certain decisions of INS officers in a wide variety of proceedings in which the Government of the United States is one party and the other party is either an alien, a citizen, or a transportation carrier. Board decisions are binding on all INS officers and Immigration Judges unless modified or overruled by the Attorney General or a federal court. The Board's purpose is to provide a nationally uniform application of the immigration laws, both in terms of the interpretation of the law and the exercise of the significant discretion vested in the Attorney General. The majority of cases before the Board involve appeals from orders of Immigration Judges entered in immigration proceedings. The Board has received approximately 30,000 cases per year for the last several years, an extremely large volume for an appellate body. This is a dramatic increase from the number of cases received in the early 1990's. For example, in 1992, the Board received only 12,774 appeals or motions, less than half of the current number of cases now received annually. In FY 2001 the Board received approximately 28,000 appeals or motions and completed approximately 32,000 appeals or motions, in large part due to initiatives implemented by Board management.

Processing an increasing caseload has been a challenging task in a time of major legislative action in the immigration arena. The number of appeals from the Immigration Courts has risen from 10.9% in FY 1996 to 15.7% in FY 2001. The Board has provided the principal interpretation of the Immigration Reform and Control Act of 1986 (IRCA); the Immigration Amendments of 1988; the Anti-Drug Abuse Act of 1988; the Immigration Act of 1990 (IMMACT 90); the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA); the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA); the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA); and the Haitian Refugee Immigration Fairness Act (HRIFA) of 1998. New challenges will include interpretation of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), the Legal Immigration

and Family Equity Act of 2000 (LIFE), and the PATRIOT Act of 2001. These laws have represented the most fundamental restructuring of the Immigration and Nationality Act (INA) since its enactment in 1952, and have presented a myriad of new issues of statutory construction. The Board's mission requires that national policies, as reflected in immigration laws, be identified, considered, and integrated into its decision process.

In response to the continuously increasing caseload associated with increased INS apprehensions and legislative developments, the Board has initiated a variety of management and regulatory improvements designed to increase efficiency, while maintaining due process guarantees for all parties.

In addition to its numerous management initiatives, EOIR has continued to improve programs through the regulatory process. For example, the Board's jurisdictional and procedural regulations have been amended to expedite the motions and appeals practice to allow the Board to assume direct control of appellate filings, replacing a cumbersome and decentralized system of filing at local Immigration Courts.

A much broader regulatory initiative, called "streamlining", was also recently implemented. Under these published regulations, noncontroversial cases that meet specified criteria may be reviewed and adjudicated by a single Board Member. The type of case amenable to this "streamlining" procedures include: unopposed motions, withdrawals of appeals, summary remands, summary dismissals, other procedural and ministerial issues determined by the Chairman, and affirmances of Immigration Judge decisions without opinion. This latter category is limited to the following:(1) where the result reached in the decision under review was correct and that any errors in the decision were harmless or nonmaterial and (2) where the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or (3) where the factual and legal questions raised on appeal are so insubstantial that three Member review is not warranted. This initiative is currently being implemented through a pilot project, and the results of this project are being used to implement streamlining on a permanent basis. For FY 2001 approximately 58% of all incoming cases were sent to the streamlining panel. The streamlining panel issued 15, 372 decisions which helped the Board increase its productivity by 50% for the last fiscal year. An independent audit concluded that streamlining did not result in an appreciable difference in the ultimate outcome of a case, nor did it affect the rate of legal representation of aliens in appeals before the Board. The independent auditor also concluded that the Streamlining Project has been an "unqualified success".

The Department recently submitted a proposed regulatory amendment that addresses additional procedural changes in how the Board adjudicates cases. The Department incorporates many of the streamlining procedures presently utilized by the Board. These proposals will promote additional expeditious review of all pending and incoming appeals. I would be pleased to discuss these initiatives in general terms with you today.

Office of the Chief Administrative Hearing Officer:

The Office of the Chief Administrative Hearing Officer (OCAHO) is comprised of a Chief Administrative Hearing Officer (CAHO) and three Administrative Law Judges (ALJs). The ALJs adjudicate individual cases according to the Administrative Procedures Act. OCAHO cases involve: (1) the unlawful hiring, recruiting, referring for a fee, or continuing employment of unauthorized aliens by employers, and their failure to comply with employment verification requirements (employer sanctions); (2) immigration-related unfair employment practices; and (3) immigration document fraud. Complaints under these sections of the Act are brought by the INS, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, or private individuals. All decisions by this office are considered final unless overturned by a Federal court or the Attorney General.

In the area of document fraud, a settlement was recently approved in the class action lawsuit of *Walters v. Reno*, the case which has effectively suspended enforcement of the civil document fraud provisions of Section 274C of the INA and resulting cases for the past four years. Settlement of the Walters case could increase OCAHO's caseload substantially as INS resumes enforcement of Section 274C, since the coverage of the statute was broadened considerably by amendments to the law in 1996 and because a higher percentage of respondents in document fraud cases can be expected to request an ALJ hearing with the adoption of new procedures included in the settlement.

OCAHO judges have been empowered to assist Board panels in the adjudication of Board cases as temporary Board Members.

Thank you for this opportunity to appear before the Subcommittee. I look forward to working with members of the Subcommittee and would be pleased to answer any questions you may have.

Mr. GEKAS. We thank the witness.

And we turn to the final witness, Mr. Yale-Loehr.

STATEMENT OF STEPHEN YALE-LOEHR, IMMIGRATION ATTORNEY, CORNELL UNIVERSITY LAW PROFESSOR

Mr. YALE-LOEHR. Thank you, Mr. Chairman. I appreciate this opportunity to testify at this oversight hearing. My testimony focuses on the Board of Immigration Appeals and the Administration's proposal to reform the BIA.

Legal scholars have written that there are four goals of any administration process: accuracy, efficiency, acceptability, and consistency. These goals must be balanced. The Attorney General's proposed reforms of the BIA must be measured against these four goals as well as the due process requirements of the U.S. Constitution. I share the concerns of many about the backlogs at the BIA and the time taken to complete cases. However, I opposed any proposed solution that would tilt the balance too much toward efficiency and away from accuracy, acceptability and consistency, the other three goals.

For example, existing backlogs are not necessarily the result of inefficiency, but rather reflect a lack of resources. A reduction in the number of members of the Board would not necessarily enhance fairness or efficiency. As Mr. Rooney has pointed out, the BIA currently has 23 permanent Board positions, with 19 positions currently filled, supported by over 100 staff attorneys.

Proposed reduction in the size of the Board would require each of the 11 remaining board members to complete about 50 cases a week to keep current with incoming receipts. Even presuming that several staff attorneys support each board member, proposed workload is staggering. Eliminating board members will not resolve backlog problems. It's like saying that the way to reduce traffic on Interstate 95 is to eliminate two lanes of the four-lane highway each way. The BIA already has successfully implemented procedures to streamline and expedite cases. The current streamlining program that Mr. Rooney has outlined has allowed the Board to allocate resources more effectively, and to adjudicate its growing caseload by concentrating on the most significant cases.

To amplify what Mr. Rooney has said, I understand that in part because of the streamlining program, for the first time last year, the BIA was able to reduce its case backlog, deciding about 4,000 cases more than it took in that fiscal year. Moreover, within the streamlining program about 85 percent of the cases within that program are decided within 180 days. Rather than implementing the broad and untested reforms envisioned in the Attorney General's proposal, I believe the Board should be allowed to continue to fine tune the current streamlining initiative to build on its proven success.

It's also important to remember that thorough and thoughtful administrative review at the BIA level is even more important than ever in light of the limits on judicial review imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

Congress placed significant restrictions on judicial review of immigration cases in 1996. As a de facto matter, therefore, the BIA is thus the tribunal of last resort for many people seeking review of immigration judge decisions.

Given these facts, it is important that full and fair administrative appellate review not be compromised merely to be efficient. Persons facing removal and possible life-threatening circumstances in their home country deserve careful consideration of their claims to relief. A full-staffed Board of Immigration Appeals that has adequate resources to complete its decision making in an efficient and timely manner best provides such consideration. This is particularly important when you consider that 56 percent of cases at the Immigration Judge level and 34 percent of cases appealed to the BIA are brought pro se by people without attorneys.

Reforming the BIA is an important activity. It should involved improving the screening of cases that have limited factual or legal disputes, and instituting programs to provide free legal representation in important cases. It is important that Immigration Courts be independent, impartial, and include meaningful checks and balances. Due process requires no less.

To that end, the American Immigration Lawyers Association advocates the creation of a separate Executive Branch agency that would include the trial level immigration courts and the Board of Immigration Appeals. Such an article I body would best protect and advance America's core legal values by safeguarding the independence and impartiality of the Immigration Court system.

I would welcome another opportunity to come back before this Subcommittee to discuss an independent Immigration Court.

In sum, the American Immigration Lawyers Association believes that any reform should include the following three considerations. First, the independence and impartiality of the immigration judges and the Board of Immigration Appeals must be affirmed. Second, any changes must maintain, not erode immigrants' access to the BIA, consistent with due process requirements. And third, any changes must enhance efficiency, increase accuracy, acceptability, accountability and consistency while facilitating oversight and review.

Thank you and I welcome your questions.

[The prepared statement of Mr. Yale-Loehr follows:]

PREPARED STATEMENT OF STEPHEN YALE-LOEHR

Mr. Chairman and distinguished Members of the Subcommittee, I am Stephen Yale-Loehr. I teach immigration and refugee law at Cornell Law School in Ithaca, New York, and am co-author of *Immigration Law and Procedure*, a 20-volume immigration law treatise that is considered the standard reference work in this field of law. I am honored to be here today representing the American Immigration Lawyers Association (AILA). AILA is the immigration bar association of more than 7,600 attorneys who practice immigration law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is an affiliated organization of the American Bar Association (ABA).

AILA takes a very broad view on immigration matters because our member attorneys represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States. AILA members also represent thousands of U.S. businesses and industries that sponsor highly skilled foreign professionals seeking to enter the United States on a temporary basis or, having proved the unavailability

of U.S. workers, on a permanent basis. Our members also represent asylum seekers, often on a pro bono basis, as well as athletes, entertainers, and foreign students.

AILA appreciates this opportunity to testify today on the Executive Office for Immigration Review (EOIR). While there are many issues to discuss, my testimony today will focus on the Board of Immigration Appeals (BIA or Board) and the Administration's proposal to change the Board. AILA members frequently appear before the BIA and are vitally interested in this body's processes and procedures. We share the concerns expressed by the Bush Administration and others about both the backlogs at the BIA and the time taken to complete cases. While we share many of the Administration's concerns, AILA opposes parts of the Administration's proposed solutions. We fear that the Administration's proposal would tilt the balance in favor of expeditiousness, instead of careful and just adjudications. While it is vitally important to improve the efficiency and effectiveness of immigration adjudications, any changes must satisfy due process requirements. Proposed reforms must be viewed in that light.

We look forward to a lively and thoughtful discussion on remedies that will result in fair, efficient, impartial, and accountable reviews.

BACKGROUND AND ORGANIZATION OF THE EOIR AND THE BIA

The EOIR was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization that combined the BIA with the Immigration Judge (IJ) function previously performed by the Immigration and Naturalization Service (INS). Along with establishing EOIR as a separate agency within the DOJ, this reorganization made the immigration courts independent of the INS, the agency charged with enforcing federal immigration laws. The EOIR also is separate from the Office of Special Counsel for Immigration-Related Employment Practices in the Department of Justice (DOJ) Civil Rights Division and the Office of Immigration Litigation (OIL) in the DOJ Civil Division. As an office within the DOJ, the EOIR is headed by a Director who reports directly to the Deputy Attorney General.

Under authority delegated by the Attorney General, the EOIR administers and interprets federal immigration laws and regulations through the conduct of immigration court proceedings, appellate reviews, and administrative hearings in individual cases. The EOIR carries out these responsibilities through its three main components:

- The BIA, which hears appeals of decisions made in individual cases by IJs, INS District Directors, or other immigration officials;
- The Office of the Chief Immigration Judge (OCIJ), which oversees all the immigration courts and their proceedings throughout the United States; and
- The Office of the Chief Administrative Hearing Officer (OCAHO), which became part of the EOIR in 1987, to resolve cases concerning employer sanctions, document fraud, and immigration-related employment discrimination.

The BIA is the highest administrative body for interpreting and applying immigration laws. It is composed of 23 Board Member positions (four vacancies currently exist), including the Chairman and two Vice Chairmen who share responsibilities for Board management.

As historical background, a Board of Review functioned within the Department of Labor between 1922 and 1940 and was empowered with reviewing immigration cases and making recommendations to the Secretary of Labor as to their disposition. In 1940, the administration of immigration affairs was transferred to the DOJ, and the Board of Review was replaced with the Board of Immigration Appeals. The new Board was empowered to render final administrative decisions in such matters, subject only to possible review by the Attorney General. As noted above, the 1983 reorganization created the EOIR and placed the Board under the umbrella of that office.

The BIA never has been recognized by statute, and is entirely a creature of the Attorney General's regulations. It is completely independent of the INS, and accountable directly to the Attorney General through a separate chain of command.

The Board has nationwide jurisdiction to hear appeals from certain decisions rendered by IJs and District Directors of the INS in a wide variety of proceedings in which the Government of the United States is one party and an alien, a citizen, or a business firm is the other party. In addition, the Board is responsible for the recognition of organizations and accreditation of representatives requesting permission to practice before INS, the Immigration Courts, and the Board.

Decisions of the Board are binding on all INS officers and IJs unless modified or overruled by the Attorney General or a federal court. All Board decisions are subject to judicial review in the federal courts. The majority of appeals reaching the Board involve orders of removal and applications for relief from removal. Other cases be-

fore the Board include the exclusion of aliens applying for admission to the United States, petitions to classify the status of alien relatives for the issuance of preference immigrant visas, fines imposed upon carriers for the violation of immigration laws, and motions for reopening and reconsideration of decisions previously rendered.

THE EXPONENTIAL GROWTH OF THE BIA'S CASELOAD AND THE SUCCESS OF THE RECENTLY IMPLEMENTED "STREAMLINING" INITIATIVE

Annual appeals filed with the BIA have increased ten-fold since 1984. According to statistics from the EOIR, in fiscal year (FY) 1984 the Board received fewer than 3,000 cases; in 1994, more than 14,000 cases; and in 2000, nearly 30,000 cases. In addition, the BIA now reviews the decisions of over 200 IJs, up from 69 judges in 1990 and 86 in 1994.

The BIA has grappled with its burgeoning caseload in several ways. Since 1995, it has expanded the number of permanent Board Members on several occasions, growing from five permanent positions to the current 23 Board Member positions, four of which remain vacant. Significant staff increases have accompanied the expansion of the Board.

On October 18, 1999, the EOIR published a final rule in the Federal Register establishing a streamlined appellate review procedure for certain categories of cases. The new streamlining procedures permit a single Board Member to issue affirmances without opinion in cases where: (1) the result below was correct; (2) any errors in the decision were harmless or immaterial; and (3) either the issue on appeal is squarely controlled by existing BIA or federal court precedent or the factual or legal issues raised are so insubstantial that three-member panel review is not warranted. The streamlining procedures also allow for single Member disposal of certain motions, withdrawals of appeals, summary remands, summary dismissals, and other procedural or ministerial issues, as determined by the BIA Chairman.

The streamlining program is being implemented in four phases. Phases I and II involved the conversion of certain categories of cases to single Member review. Building upon those initial phases, Phase III (the Streamlining Pilot Project) began on September 5, 2000, and incorporated for the first time the summary affirmance procedures provided for in the regulation. Phase IV will consist of the permanent implementation of the streamlining program.

An outside auditor recently conducted an independent assessment of the Streamlining Pilot Project to evaluate its effectiveness and to make recommendations to implement the project's final phase. According to a summary of the audit, the assessment included an analysis to compare and contrast changes that have occurred as a result of streamlining, and the impact on the process and productivity of the Board's non-streamlined aspects. The audit team concluded that the "overwhelming weight of both 'objective' and 'subjective' evidence gathered and analyzed indicated that the Streamlining Pilot Project has been an unqualified success." Specifically, the report found that streamlining has "significantly improved" productivity, both in terms of the number of cases completed and the average number of days required for a case to be processed.

The report notes that although the efficiency of streamlining is expected to eliminate the remainder of pending cases eligible for streamlining within 20 months, the program should remain viable and can be sustained based solely upon the incoming stream of cases. For example, the report continues, the Board in FY 2001 received an average of 2,350 new cases per month, approximately 35 percent of which were completed by the streamlining panel. Assuming the continuation of this trend, the report adds, streamlining should dispose of approximately 825 cases per month plus any additional cases made appropriate for streamlining by changes in the statute, regulations, case law, or expansion of the streamlining categories.

THE ATTORNEY GENERAL'S RECENT PROPOSAL FOR REGULATORY CHANGES

Attorney General John Ashcroft reportedly has signed off on a proposed rule that would make a number of procedural reforms at the BIA, including cutting the number of Board Member positions from the current 23 permanent positions to 11. While the rule has yet to be published in the Federal Register at the time this testimony was submitted, an advance summary of the proposed regulatory changes obtained by AILA states that the proposed reforms are intended to accomplish the following five objectives:

- Eliminating the backlog of approximately 55,000 cases currently pending before the Board;
- Eliminating delays in the adjudication of administrative appeals;

- Using the EOIR's resources more efficiently;
- Focusing the Board's resources on those case that present disputed legal questions; and
- Enhancing the quality of BIA decisions.

Specific reforms outlined in the proposal include:

Single-Member Review and New Criteria for Three-Member Panel Review. According to the advance summary, the proposed rule would mandate single-Member review for all cases except those falling within one of five enumerated categories. Those five categories include cases in which there is a need to: (1) settle inconsistencies in the rulings of IJs; (2) clarify ambiguous laws, regulations, or procedures; (3) correct an IJ's decision that does not comport with the law; (4) resolve a case or controversy of "major national import"; or (5) correct a clearly erroneous factual determination by an IJ. Cases falling within one of these categories would be adjudicated by a three-Member panel, as is the current practice.

Under the proposal, all cases would initially go to a five-Member "screening panel," on which single Members would decide the majority of cases. Each Member of the panel would individually screen cases and would either adjudicate the case him- or herself, or determine that the case merits three-Member panel review. The BIA Chairman would have the discretion to allocate Members to the screening panel and three-Member panels, as he or she "deems appropriate."

Elimination of De Novo Review. The proposed rule also would eliminate the BIA's de novo review of factual issues, requiring Members to accept the factual findings of the IJ unless they are "clearly erroneous." The rule thus also would prohibit the introduction and consideration of new evidence in proceedings before the Board. In addition, the proposal would restore a regulatory provision that allows the Board to dismiss summarily an appeal that is filed for an improper purpose, such as to cause unnecessary delay.

Time Limits. The new rule also would establish a series of time limits geared toward expediting the adjudication process. IJs would have to complete their review of the decision transcripts within 14 days. Parties would still have 30 days to file an appeal, but would have to brief the case simultaneously within 21 days. Current procedures allow each party 30 days in which to file their respective briefs. *See* 8 CFR § 3.3(c)(1) and (2). The single Members of the new screening panel would have 90 days in which to either decide the case or refer it for three-Member panel review, and the three-Member panels normally would have to decide the case within 180 days.

If the Member drafting the opinion is unable to meet the 180-day deadline, he or she could request from the BIA Chairman an extension of up to 60 days. If the decision of panel majority is still not completed at the end of the 60-day period, the Chairman either would have to decide the case her- or himself, within 14 days, or refer the case to the Attorney General for a decision. If a dissenting or concurring panel member fails to complete his or her opinion by the end of the 60-day extension period, the majority decision would be rendered without that dissent or concurrence attached.

The Chairman would be required to notify the Director of the EOIR or the Attorney General if any Board Member repeatedly fails to meet assigned deadlines, and compliance with such deadlines would be reported each year in annual performance reviews. The rule would provide an exception to these time limits in cases where an impending decision by the Supreme Court or a court of appeals would "substantially determine the outcome of a case before the BIA." In such cases, the Chairman would have the discretion to hold the case until such decision is rendered.

Prioritization, Case Management System, and Transfer of Some Cases to OCAHO. The proposed rule also would require the Board to give priority to cases involving detained persons, and would require the Chairman to establish a case management system for the expeditious resolution of all appeals. In addition, jurisdiction over appeals of INS decisions imposing administrative fines would be transferred from the BIA to the OCAHO.

New Procedures to be Implemented Immediately and Applied to the Backlog. The new procedures outlined above would begin immediately upon the rule's effective date, and would apply both to incoming cases and cases currently pending in the backlog. The rule envisions that the Board will have eliminated the backlog at the end of a 180-day "transition period," with no case pending for longer than ten months from the completion of the record on appeal.

Reduction in Number of Board Members. At the conclusion of the 180-day period, the rule would reduce the number of Board Members to 11, with the Attorney General designating the membership. Five Members including the Chairman would serve on the new screening panel, while the remaining six would either be divided

into two three-Member panels, or three two-Member panels, with IJs rotating in to serve as third Members.

AILA FULLY SHARES THE ATTORNEY GENERAL'S CONCERN THAT THE BIA ACHIEVE TIMELY AND EFFICIENT ADJUDICATIONS AND BACKLOG REDUCTION. HOWEVER, THE ADMINISTRATION'S PROPOSAL WOULD NOT ADDRESS SUCCESSFULLY THE BACKLOG AND CASE TIME CONCERNS AND COULD LEAD TO A DIMINUTION OF DUE PROCESS

The many members of the American Immigration Lawyers Association who practice before the BIA fully support the Attorney General's goal of achieving timely and efficient adjudications and backlog reduction. It serves no one's interest, not the attorney and certainly not the foreign national respondent, to have appeals languishing in a backlog while the respondent either remains in detention or otherwise awaits a final decision that will determine his or her fate.

It may have been the case in some instances in the past that a person could achieve some benefit from delay. Accrual of time toward qualifying for certain forms of relief from deportation; the passage of time in which new changes in law provided new benefits; higher court decisions that set new precedent that might determine the outcome of certain cases: all of these factors potentially could benefit a person awaiting BIA action on their case.

However, changes in our immigration laws enacted by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) largely eliminated any possible benefit of delay. The "stop time" rule enacted in IIRAIRA § 309(c)(5) eliminated accrual of time toward qualifying for relief. And the uncertainty facing a respondent whose grant of relief is being challenged by the INS is an incredibly stressful factor that every respondent wants ended by a final adjudication by the administrative appellate body.

AILA has argued strenuously for timely adjudications of petitions and applications for INS benefits, and supports the INS Commissioner's goal of achieving six-month adjudications for all immigration cases. AILA also strongly supports the Attorney General's stated goal of having the BIA complete adjudications within a six-month time period. This time period should be much shorter for persons who are detained by the INS during their appeal process. AILA also fully supports the Attorney General's goal of completely clearing the current BIA backlog of 55,000 cases within a reasonable period of time.

AILA does not believe, however, that the methods the Attorney General has proposed for achieving timely adjudications and backlog elimination will succeed, for the following reasons:

- *Existing backlogs are not the result of inefficiency but reflect a lack of resources. A reduction in the number of Board Members does not genuinely serve the interests of fairness or efficiency.* The Board of Immigration Appeals currently has 23 permanent Board positions, with 19 positions currently filled, supported by about 120 staff attorneys. The Board is expected to adjudicate annually about 30,000 and deal with a backlog of 55,000 cases. The streamlining measures that took effect a little more than one year ago have begun to show results. Case completions have increased from an average of about 20 per staff attorney per month to about 40 to 50 per staff attorney per month.

  The proposed reduction in the Board would require each of the 11 Board members to complete an average of over 50 cases each week to keep current with incoming receipts. Even presuming that nine staff attorneys support each Board member, the proposed workload is staggering. We fear that Board Members would be forced to rubber-stamp IJ decisions without thorough and thoughtful review and analysis. The ability of the Board to provide a sound basis for circuit court review would be compromised. The fairness of the adjudicatory process would suffer.

  It is counterintuitive to think that eliminating Board Members and implementing more stringent streamlining will resolve backlog problems. The importance of the work of the Members of the BIA must not be underestimated. Board Members often make decisions that will determine whether someone who has been persecuted and tortured will live or die, whether a U.S. family will be divided, or whether a permanent resident who has lived here for decades will be returned to a country where he/she has no ties. Board Members have to make these decisions in a dynamic framework. Congress has enacted important changes in our immigration laws several times in the last five years, and ambiguities exist with regard to some aspects of those changes. Moreover, country and political conditions frequently change, affecting the decisions that Board Members must make.

Board Members have some of the most difficult jobs assigned to any adjudicator in our nation. To their credit, Members of the Board take their work very seriously and treat each case with the thought and care it requires and deserves.

To reduce backlogs and allow Board Members to keep current with incoming appeals, we urge the Attorney General to increase the number of Board Members, staff attorneys and support staff, while imposing the proposed time deadlines, to allow the backlog to be cleared while supporting the judges in their important work.

The Administration proposal to reduce the number of Board Members raise troubling concerns about how the Attorney General will determine who would stay on the Board and who would be dismissed. If the dismissals are not based on seniority or some other objective and defensible criterion, the Administration leaves itself open to the charge that the Attorney General will have fired Board Members for other than merit-based assessments. Equally troubling is the potential impact of these future dismissals on the independent decision making of all BIA Members during the six- to nine-month transition period.

- *Eliminating the BIA's de novo factual review will increase dramatically both the number of cases remanded and the number of appeals taken to the federal courts.* Under the proposed regulations, the BIA would be denied the opportunity to review the facts and testimony of the underlying case in making its decision unless they are "clearly erroneous." The result would be that the BIA would engage only in a cursory review of matters that often rise or fall on the particular facts of a given case. If the BIA is prevented from being able to review details of the underlying case, or to present a thoughtful and rational basis for its decision in either upholding or denying a matter on appeal, the federal court reviewing that decision will be deprived of the thought processes used by the BIA in making its final decision. When the federal courts are asked to look to those BIA decisions for purposes of review, the federal courts will be required to routinely remand such cases back to the BIA to request the full analysis of the Board's thinking in each decision. Any system that routinely involves remands for purposes of clearer decisions in the courts below cannot be said to achieve any type of efficiency; rather, such a system would institutionalize inefficiency.

  Under current practices, the Board has a strict policy for deferring to the findings of fact made by immigration judges. However, there are situations where a review and analysis of an immigration judge's findings of fact is appropriate. Raising the standard to require a showing that the decision of the immigration judge was "clearly erroneous" imposes an unnecessary and overly harsh burden.

  Although regulations require that immigration hearings be recorded, in the vast majority of cases immigration judges render oral decisions immediately upon the completion of testimony. They do not review the recorded testimony, but instead rely on their memory and any notes taken during the proceedings. As a result, immigration judges will occasionally misstate or omit important factual information in their decisions. The BIA should have the opportunity to correct these errors when they affect the outcome of cases.

  The need for a de novo review of the factual finding of an immigration judge is particularly compelling in asylum cases. Even with a streamlined review process, the BIA must have the flexibility to deal with changed country conditions and the development of new facts that can have a decisive effect on the outcome of a case. Where the outcome of a case can literally be a matter of life and death, administrative burdens must be properly balanced against the need to review all of the facts and circumstances surrounding the case.

  We must also remember that 56 percent of all people who appear before an immigration judge do not have an attorney. When combined with the language barriers that many people face, immigration decisions are sometimes based on confusion or the innocent mistakes of an unrepresented person. Our system strongly favors a ruling on the true facts of a case, and the Board should continue to have the opportunity to examine all aspects of the case. Where factual errors, mistakes or confusion can be cleared up on appeal, the Board should not be denied the opportunity to make the correct ruling simply because of inability to meet the very difficult burden of proving that the findings were "clearly erroneous."

  In fact, if the BIA is allowed to clarify factual errors, federal courts then will not have to remand cases, thereby improving overall efficiency. The BIA

also should be allowed to consider new evidence, such as changes in country conditions, something that the Administration's proposal would also prevent from being considered. The Administration's proposal would generate additional concerns if it were to bar motions to reopen based on new evidence. Such a bar could violate due process protections.

- *The BIA has already successfully implemented procedures that allow it to streamline and expedite cases.* As noted above, the current streamlining program has allowed the Board to allocate resources more effectively and to adjudicate the growing caseload by concentrating on more significant cases that may require greater deliberation or that may present novel legal questions. For example, many appeals filed with the Board raise complex issues of law arising from broad antiterrorism and immigration reform legislation that was passed in 1996, as well as critical issues arising from subsequent legislation.

  According to the independent audit recently conducted, the pilot phase of the streamlining program directly contributed to a 53 percent increase in the overall number of BIA cases completed during its implementation period from September 2000 through August 2001. Specifically, between 1997 and 2001, the average number of BIA cases completed in less than 90 days increased from 25 percent to 56 percent, while the average number of cases that remained open 181 days or longer dramatically decreased from 42 percent to 13 percent.

  Rather than implementing the overly broad and untested reforms envisioned in the Attorney General's proposal, the Board should continue to fine-tune the current streamlining initiative, working within the existing framework to build upon its proven success.

- *Three-judge panels should remain the norm, not the exception.* The Attorney General's proposed restructuring appears to assume that the vast majority of BIA appeals do not involve complex questions of law or legal interpretation. The proposed restructuring contemplates that the majority of the cases will be "screened" and then assigned to single Board Members for adjudication, with only certain "qualifying" cases forwarded for panel consideration. The proposal does not detail how the screening committee would be selected and who would do the selecting.

  These assumptions are erroneous. The vast changes in our nation's immigration laws since 1996 require much interpretation. The law is not crystal clear, congressional intent is often ambiguous, the INS itself often argues positions that courts later hold are contrary to Congressional intent, complex interplays of transition rules and retroactivity provisions must be sorted out, and circuit courts of appeals constantly review, refine, and even overturn Board precedent.

  Furthermore, a significant number (34 percent) of BIA cases are brought pro se. In these cases, the Board does not have the benefit of legal briefs to assist them in analyzing the complex legal issues that may be presented. In this ever-changing and challenging environment, the interplay of diverse legal minds and opinions is important. In fact, the Department of Justice has taken important steps toward expanding the diversity of the Board by recruiting members from academia, government service and private practice. Such diversity disperses any biases and permits the exchange and testing of ideas. To allow one perspective to rule the outcome of a single case would limit the value of the Department's effort and increase the likelihood of an aberrant decision.

  Relying on a single decision in the majority of cases also eliminates the opportunity for written dissenting opinions. Dissenting opinions are an important part of the appellate process and the evolutionary nature of our laws. These opinions help shape the legal arguments that are made in future cases, and enhance the critical thinking that enriches our judicial system.

  The use of appellate panels and the filing of dissenting opinions also promote efficiency when the decisions are subject to review by federal judges. Panels promote a full exploration of all aspects of a case, and the existence of dissenting opinions offers proof that divergent views were considered on appeal. This process makes it less likely that a federal court will overturn or remand a decision for failure to consider the proper facts and law. This promotes overall efficiency in the immigration review system.

- *Thoughtful and thorough administrative review at the BIA level is more critical than ever in light of the limitations on judicial review imposed by the IIRAIRA.* Congress placed significant restrictions on judicial review of immigration cases in 1996. The result is that the BIA is the court of last resort

for the vast majority of those seeking review of immigration judge decisions. IIRAIRA prohibits judicial review in many cases that involve discretionary decisions regarding relief from deportation and many cases that involve underlying criminal convictions. While these restrictions continue to be challenged in court in selective cases, and while the U.S. Supreme Court has not yet ruled on the constitutionality of the restrictions, most cases never go beyond the BIA.

Further, in cases where the respondent is unrepresented by legal counsel, most do not have the resources to pursue their cases to the circuit courts of appeals. The BIA thus serves by necessity as the court of last resort for the vast majority of pro se respondents.

Given these facts, it is extremely important that full and fair administrative appellate review not be compromised in the name of efficiency. Persons facing removal and possible life-threatening circumstances in their home country deserve careful consideration of their claims to relief. A Board of Immigration Appeals that enjoys a fully staffed complement of adjudicators given appropriate and adequate resources to complete their decision-making in an efficient and timely manner best provides such consideration.

- *The Attorney General's proposed regulations present additional procedural concerns and contain questionable retroactive applicability.* AILA will address these and other areas more fully in written comments once the proposed regulation has been published. Areas of concern include the proposed requirement for simultaneous briefing in 21 days. Such a deadline would defeat the purpose of opposing briefs that can both address points made by each side and provide judges the benefit of full elaboration of the issues. Without such elaboration, their job becomes more difficult. In addition, the Attorney General's proposal to apply the new regulation retroactively would change settled expectations by modifying the standard of review for cases already on appeal.

  Moreover, any proposed reforms must be considered in light of the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). That test assesses the private interest that will be affected by official action, the risk of an erroneous deprivation of such interests through the procedures used as well as the value of additional safeguards, and the nature of the government's interests. In particular, the proposed elimination of the BIA's de novo factual review raises concerns vis-à-vis the *Mathews* test, in that such elimination might raise significantly the risk of an erroneous deprivation of due process, particularly with regard to pro se respondents, as discussed above.

THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW SHOULD CONSTITUTE A SEPARATE AND INDEPENDENT AGENCY OUTSIDE OF THE DEPARTMENT OF JUSTICE

Reforming the BIA is an important activity and should involve increasing the number of Board Members, improving the screening of cases that have limited factual or legal disputes, and instituting programs to provide free legal representation in meritorious matters. It is vitally important that immigration courts be independent, impartial and include meaningful checks and balances. Due process requires no less. To that end, AILA advocates the creation of a separate, Executive Branch agency that would include the trial-level immigration courts and the BIA. Such an Article III body would best protect and advance America's core legal values by safeguarding the independence and impartiality of the immigration court system. I would welcome another opportunity to come before this Subcommittee to discuss an independent immigration court.

CONCLUSION

There are four goals of any administrative process: accuracy, efficiency, acceptability, and consistency. See generally Stephen Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1313 (1986). Accuracy reflects the need to determine the truth. Efficiency encompasses minimizing the monetary costs to the parties and to the public as well as the costs of the waiting time and the decision makers' time. Acceptability recognizes the importance of having a procedure that the litigants and the general public perceive as fair. Consistency enhances stability and helps assure equal treatment of similarly situated litigants. The Attorney General's proposed reforms of the immigration appeal function must be measured against these four goals, as well as the due process requirements of the U.S. Constitution. Specifically, AILA believes that any reforms should include the following considerations:

- The independence and impartiality of the immigration judges and the immigration court system must be affirmed;
- Proposed changes must facilitate, not erode, immigrants' access to the BIA and federal courts, consistent with due process considerations in this mass justice system; and
- Such changes also must enhance efficiency, increase accuracy, acceptability, accountability and consistency, and facilitate oversight and review.

Mr. GEKAS. Thank the gentleman. We will now engage in a question and answer period. I hope questions. I hope answers. The Chair will allot itself 5 minutes for the initial round of questions.

Mr. Yale-Loehr, if we did nothing else except cut the time within which an appeal must be adjudicated, wouldn't you agree that that would result in more efficiency even if we didn't change the numbers of the personnel on the Board of Immigration Appeals?

Mr. YALE-LOEHR. Yes, it would result in more efficiency, but you have to remember that there are four goals in any administrative process. Efficiency is one important goal, but accuracy, consistency and fairness are equally important. You need to balance those four goals, and particularly in cases like asylum where you have life and death situations, you have to make sure that you're not sending back to a country where they may be persecuted inadvertently, and so for that reason you want to make sure that you're giving the right decision, as well as doing it in a timely manner.

Mr. GEKAS. Well, our jurisprudence is laden with time periods beyond which other means have to be adopted, but we have the cutoffs every place in the law that call for efficiency, and along the line we also provide fairness and the other things I believe. And that's one area in which all witnesses seem to agree, at least in a time certain within which the appeal process can effectually be taken.

I had—but I wondered, Mr. Heilman, when you first testified, in my own mind, you talked about a time limit of 120 days, and it's sent up and it languors there—it's in a state of languor for 120 days we'll say. What happens then bureaucratically under your theory? Does it lapse if nothing is done in the 120 days?

Judge HEILMAN. I assume at that point that the appeal would be automatically dismissed.

Mr. GEKAS. When you say automatically dismissed——

Judge HEILMAN. Dismissed by the Board for a lack of jurisdiction, and then—or some other reason other than the merits, and that the original decision of the Immigration Judge then would be the decision that is in the case, and if any judicial review were possible after that, that would be the decision that would be reviewed.

Mr. GEKAS. In the course of your observations, are the decisions consistent or inconsistent, or how would you characterize them?

Judge HEILMAN. The Immigration Judges' decisions?

Mr. GEKAS. Yes.

Judge HEILMAN. As a body? I think the vast majority of the decisions are consistent——

Mr. GEKAS. The Board we're talking about.

Judge HEILMAN. I'm sorry? The Board?

Mr. GEKAS. The Board of Immigration Appeals.

Judge HEILMAN. I heard you say Immigration Judge. I'm sorry. Are the vast majority of the decision of the Board consistent? I would say not from panel to panel, and I think, obviously, when a

precedent decision is finally issued, if it's a majority opinion, it clearly is the case. It is the only legal precedent that exists, but that's a hard thing—it's hard for me to respond to that——

Mr. GEKAS. Excuse me for interrupting. The question would be if a panel comes through with—with something that could be considered a precedent, does it last more than a week or 10 days or 2 years, or what would constitute a precedent for the remainder of time in those kinds of cases?

Judge HEILMAN. Well, there is a formal process by which the Board does designate precedent decisions, and that is by a majority vote of the Board. At that point everyone who is in the Immigration Law process is obliged to follow that precedent, Board Members, Judges, Immigration Service, Department of State if it applies there. So the precedent decisions are a different body all together. But that's a very small percentage of the decisions that the Board issues in any given year. Of the many thousands, you're probably looking at probably close to less than 100 a year that would be precedent decisions, I would imagine, maybe 50. But the direct answer is, yes, everyone is supposed to apply that precedent decision, and it's supposed to last until it's overruled or repealed or the Attorney General intervenes and withdraws the decision.

Mr. GEKAS. Judge Mathon, you said that—not Judge—you're not a judge, are you?

Ms. MATHON. Yes, I am a judge.

Mr. GEKAS. Yes, you are a judge. Of course you are.

You stated at one point in your testimony that some of the cases are heard two or more times.

Ms. MATHON. Yes, that occurs quite frequently.

Mr. GEKAS. And that, of course, is a killer of time and——

Ms. MATHON. yes.

Mr. GEKAS. And did you look over the proposed restructure by the Attorney General?

Ms. MATHON. Yes, I did.

Mr. GEKAS. Would that help in the criticism that you launched there?

Ms. MATHON. Yes. I reviewed the summary of the proposed regulations, and I would like to make these comments on them. I do endorse the continuation of streamlining. I feel that that is the wave of the future, and can address a large number of the cases that come through the Board. But my comments with respect to what is wrong or what is missing from the regulations are as follows. I agree with the—Mr. Yale-Loehr's comment. I do not think that a reduction to 11 members is the correct magic number. I think that is too few, because if I were looking at the Board now I would probably assign five Board Members to work full time on streamlining. But that—that would leave still 40 percent of the caseload that is not amenable to streamlining, and therefore, must be adjudicated by merits panels. So that's a large number of cases, and I don't think six Board Members would be sufficient to adjudicate those cases that are not amenable to streamlining.

Secondly, the regulations do not provide for full en banc consideration or publication process. They're silent on that. That process occupies a large amount of resources also at the Board. The regulations deal only with streamlining and how to adjudicate cases in

a very expedited manner, but a very important mission at the Board is to issue precedents and——

Mr. GEKAS. The time of the Chair has expired. Perhaps we'll get back to that.

Ms. MATHON. Yes, thank you.

Mr. GEKAS. Now the Chair recognizes the lady from Texas for a period of 5 minutes of examination.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Let me thank all the witnesses for their presentation, and as well, Mr. Rooney, let me thank you for the interim leadership that you've provided to the INS as well as your service there now.

As I'm listening to the probative questions of the Chairman, I've been listening to the answers, I can clearly sense that this hearing is worth more than its weight in a pound of gold, if you will. Likewise, I would say that the announcement of the DOJ is, in my estimation, somewhat premature, but I'm sure that we're all racing to the finish line.

I say this to you, Mr. Yale-Loehr, if you would listen to some of the statements in a press announcement by the Department of Justice, and then I would like to probe you on this potential or proposed rule making that is being announced even as we speak.

"A mission of the Department of Justice—and I'd like to submit this language into the record—a mission of the Department of Justice is enforcing our immigration laws fairly, deliberately and without delay. Today's announced reorganization of the Board of Immigration Appeals will meet these objectives while protecting due process," said Ashcroft. "Justice delayed is justice denied. When it takes several years to render a decision, justice is not only denied, it is also derailed."

The good news is, is that, as I noted in my opening remarks, the words "due process" was used. If I heard one of the witnesses correctly, it seems that this issue was referred to as an administrative issue and not due process. It seems that the Attorney General accepts my interpretation.

Would you please give me a response as to what is the conflict with what they're trying to do in an orderly assessment or review of these cases, and how due process does in fact necessarily have an impact on what we're trying to do?

Mr. YALE-LOEHR. Yes, I would be happy to respond to that. I think I do have some potential due process concerns about the proposals. Obviously, the devil is in the details and I have not read the actual text of the regulations, but basically——

Ms. JACKSON LEE. And you don't mind using the terminology "due process" in the context of immigrants?

Mr. YALE-LOEHR. Absolutely not, because I believe——

Ms. JACKSON LEE. And maybe you might——

Mr. YALE-LOEHR. The Supreme Court has ruled that immigrants do receive due process under the Constitution.

Ms. JACKSON LEE. I was hoping you would recount that for us.

Mr. YALE-LOEHR. Under Mathews V. Eldridge, a 1976 case, the Supreme Court said that there is a three-part test in which we have to balance competing interests in determining the kind of due process that is due. You look at the interest of the individual. You look at the interest of the government. And then you balance be-

tween the two. That's what we have to do in this particular regulation, as in any immigration procedure, to determine whether due process has been met.

So immediate concerns that jump out to mind under this proposal is, for example, how are we going to get rid of this backlog in just 6 months? You're going to have to rush through those cases to be able to get the cases decided that quickly, and I worry that the rush to deciding those cases might interfere with due process in particular cases.

I also worry about the individual judges. Right now there are 19 judges on the Board of Immigration Appeals. After the 6-month period when presumably the backlog has been lifted, the Attorney General, as I understand it, plans to reduce that number to 11. What does that mean to the judges during that 6-month period? Are they going to have to be tailoring their decisions during that 6-month period to try to enhance their viability to stay on the Board? Are they going to make their decisions differently during that 6-month period than they would otherwise? You want to make sure that decisions are completely fair.

Ms. JACKSON LEE. May I interject for a moment?

Mr. YALE-LOEHR. Got to worry about that.

Ms. JACKSON LEE. And probe you on a point that you just made. There's been some suggestion that what the impact of the rule making and ultimate design that has been proposed by the Department of Justice is to get rid of the limited fact cases, the baby cases, the insignificant fact circumstances cases, and then we'll move on to the big ones, the complex cases. My concern is making that quick determination on the grounds of "I better hurry up and move these cases so this looks like a simple fact case." It's only a paragraph, yet it may be one of the most complex matters we'd have to address.

Answer that for me. What is the potential of throwing to the limited fact pile or the limited—or the simple file, cases that may be more complex in order to move them along?

Mr. YALE-LOEHR. Well, it is a potential concern. The Justice Department, through the BIA streamlining project, has attempted to address this already, and I think they've done a good job based on the auditor's report, in figuring out which cases truly are simple and which ones do deserve more complex consideration.

I think you also have to realize, as I stated in my testimony, that many of these cases are brought pro se without attorneys, and many people therefore are not articulating clearly some of the complex legal issues that may be in their benefit, or things at least that they ought to be drawing out on appeal. So I think that's a concern that needs to be weighed in this regulatory process.

Ms. JACKSON LEE. I thank the gentleman.

Mr. GEKAS. The Chair recognizes the gentleman from Michigan, Mr. Conyers, for 5 minutes of questioning.

Mr. CONYERS. Thank you, Mr. Chairman.

Is there anybody here on the panel that would quarrel with a 60-day review period instead of a 30-day review period?

Ms. MATHON. May I inquire, review period for what purpose?

Mr. CONYERS. For this subject matter that we're considering today.

Ms. MATHON. Oh, to extend this inquiry?

Mr. CONYERS. No. No, just to review to get the opinions before it goes into effect. We have a comment period.

Ms. MATHON. Oh, the comment period on the regulations.

Mr. CONYERS. Yeah. Is 60 days okay with everybody here?

Mr. ROONEY. Well, Mr. Conyers, speaking for the Department, the plan is to do 30 days, and——

Mr. CONYERS. Well, that's why I'm raising the question, sir. I know. I mean, would it upset your dinner tonight if you found out that the Attorney General agreed with this Subcommittee that we'd have 60 days instead of 30?

Mr. ROONEY. If the Attorney General agreed it wouldn't upset me. [Laughter.]

Mr. CONYERS. And I guess the—okay. Everybody else okay? Wouldn't matter that much?

Ms. MATHON. I'm no longer working in the field of immigration law, so I have no opinion on that subject.

Mr. CONYERS. That's exactly why we value your view on this, Judge.

Mr. GEKAS. Are you interested in my view, Mr.——

Mr. CONYERS. I'll get to you a little later. [Laughter.]

But, please, Judge. Okay, you pass. You don't have a view on it. Okay.

Mr. Heilman, what do you think?

Judge HEILMAN. This backlog has existed for many years, and the solution isn't one that should be done overnight it seems to me. I don't know where the source of information came that led to these proposals. I'm not sure who worked on them or—I can say personally I had nothing to do with them. I think that some of what is proposed there is—is very ill advised, and I would think that 60 days would be perfectly reasonable to let people weigh in on the subject. Keep in mind, quite frankly, that a few short months ago the same Attorney General increased the size of the Board and added two members to the Board who had no background whatsoever in the immigration law. I'm not sure exactly what the change in approach has come from, but it's—I'm at a disadvantage to go on because I haven't read the particular regulation, but I really wonder, you know, how it—how it came about and what the assumptions were.

Mr. CONYERS. So do I. Now, how are we going to decide which judges are dropped, Mr. Rooney?

Mr. ROONEY. We have not made any determination yet in that regard. We will be looking at several factors. I'm certain the Attorney General will be looking to me for some recommendations. I would be certainly looking to the Board. And——

Mr. CONYERS. So what are you going to use as a barometer? What's the criteria going to be?

Mr. ROONEY. We haven't really made up our minds on what that criteria will be.

Mr. CONYERS. Let's speculate on something. Let's toss off a few.

Mr. ROONEY. Well, the obvious criteria would be the experience of the individual, the judicial temperament of the individual, whatever that might mean, the efficiency in performing the job. Those

are all criteria that I know would clearly be considered, but there has been no clear list of that yet.

Mr. CONYERS. Now, could you speak, Mr. Yale-Loehr, to the—the appropriateness of here where so many people go into the lower court without a lawyer, that now de novo review of facts on appeal would be eliminated? I mean that sounds scary.

Mr. YALE-LOEHR. I think it is a real concern. And again, I think in some cases the immigration judge is careful to make sure that all the facts are brought out, but in other cases, for whatever, they are not all brought out, and I think the Board of Immigration Appeals needs, in appropriate cases, to be able to remand for further factual development where it is warranted.

Mr. CONYERS. Okay. I thank you.

Ms. JACKSON LEE. Would the gentleman yield for a moment?

Mr. CONYERS. Sure.

Ms. JACKSON LEE. I thank the gentleman very much.

I wanted to pursue the line of questioning of the Ranking Member with Mr. Rooney in particular. Just in your deliberations propose this rule making, and I'm delighted that Mr. Heilman has indicated that the extension, for someone who's had experience on the Board, does not disturb him. I hope you'll convey that to the Attorney General. But my concern is, is this rule making pursuant to the Attorney General's efforts generated after September 11th?

Mr. ROONEY. No.

Ms. JACKSON LEE. What is the basis of a rule making that by all of its definitions seems to undermine due process, which the Supreme Court has granted us?

Mr. ROONEY. Well, Ms. Jackson Lee, first addressing the question, no, it has nothing to do with September 11th. We actually started talking about these types of reforms prior to that time. And the principal catalyst for the Attorney General's interest I believe is when he became aware of the backlog and the time that it takes for cases to move through the Board, and saw that as a real due process problem.

We feel—actually, looking at some of the same standards that Mr.—Professor Yale-Loehr has talked about, is that we are simply in this process fine tuning the streamlining process, finding more cases where the issues before the Board are very straightforward and just simply avoiding the need to run that by three different Board members, so that that individual's case could be adjudicated more quickly, particularly concerned with the individual who is in detention. But if there is any case that raises issues as were just recently being discussed here, issues that would go to the application of the law to an individual's situation, those cases would be referred to a three-member panel, and we see the ability of having five, at least five single Board Members, adjudicating these cases, applying the standards that now apply to the entire Board, as simply—you're really having like five panels, because it is a very rare situation on these types of cases—and I invite my colleagues who formerly were on the Board to comment on this—very rare when one of these cases would receive a mixed vote on the Board, on a three-member panel, because they're very, very straightforward.

Ms. JACKSON LEE. I thank the Chairman for his indulgence. I simply sat to Mr. Rooney, there is a difference of opinion, and I

would hope that to formulate rules like this, eliminating fact finders, eliminating appeal processes, that you would take into consideration the difference of opinion on these issues. Thank you.

Mr. GEKAS. The time of the gentleman has expired.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. GEKAS. And we now turn to the lady from California, Ms. Lofgren, for a round of questioning.

Ms. LOFGREN. Thank you, Mr. Chairman.

I was interested, Mr. Yale-Loehr, in your testimony that begins on page 9, outlining the impact on the Federal Courts that you see emanating from these proposals. And I'm wondering—it's been a long time since I practiced law, but certainly I can recall cases that I saw where factual situations changed, especially in asylum cases, where if there's no de novo review, you know, now you've got people the same religion being machine-gunned in the home country. You're going to have an appeal, and your discussion about the need to remand, I thought was fascinating. I'm wondering if in the end, it's your opinion that this will result in actually increased work for the review panels.

Mr. YALE-LOEHR. By review panels you mean the Federal Courts?

Ms. LOFGREN. Well——

Mr. YALE-LOEHR. Or you mean by the BIA having it remanded back?

Ms. LOFGREN. Both.

Mr. YALE-LOEHR. I worry about both problems. I think that, again, we don't know exactly how these will be implemented, but if you can't look at changed circumstances, which is a big body of law, particularly in the Ninth Circuit in asylum cases, and the Board cannot look at that, and then it goes up and the same circumstances have to be dealt with by the Federal Court, you're increasing workload at the Federal Court level, which is promoting inefficiency. Then it will have to go back down to the Board of Immigration Appeals, or perhaps to the Immigration judge, and so you're increasing inefficiency there.

I think I agree with the panelist, that you want to deal with the facts one time, and do it properly, and if at some point there are changed circumstances, you should deal with that at the first opportunity, rather than have to go up and down and up again, and so I believe that can be a concern under the proposed regulations.

Ms. LOFGREN. And so while we're all concerned about the backlog, although I think we're making some progress on it actually, the—in the end, this could end up backlogging the Federal Courts in a way that I'm sure none of us would—would envision or want.

Mr. YALE-LOEHR. That's my potential worry.

Ms. LOFGREN. That's very interesting. I—you know, we all want efficiency, but as we've noted, efficiency is not the only goal. If efficiency was all we wanted, you could just take all the appeals and dump them in the trash, and they'd be very efficiently dealt with. But that wouldn't serve the interest of justice or due process. And I do have concerns that these proposals will give—while they may—may or may not actually achieve efficiency, may give some short shrift to due process issues. I do have that concern, and I share Mr. Conyers' concern that we may not have sufficient time

to really sort through them because these are large changes that will impact people of faith who are seeking safe haven here in our country, as well as potentially adversely impacting an already overburdened Federal Court system.

You know, I also wanted to get into the impact specifically on children. I was pleased that Commissioner Ziegler, just a few days ago, committed the INS to minimizing the need for detention of unaccompanied minors, and I know he's seeking alternatives wherever possible to ensure that juveniles have access to benefits and services, where they're entitled to do that. And I've had discussions with the Commissioner, both privately and publicly, about the need to take steps to make sure that young people are treated in a human way.

I continue to have concerns about a particular case, Boy Scouts, that so far as I know are still I custody, still locked up. You know, you've heard the phrase, "Gosh, he's such a Boy Scout." These are actually Boy Scouts that are making an asylum claim. I am in no position to say whether or not their asylum claim is valid when that's something that will be decided in due course, but that these Boy Scouts would be in a locked facility rather than foster care, to me is just mind boggling. And I'm wondering, Mr. Rooney, whether there's any explanation that you can give consistent with your obligations about that?

Mr. ROONEY. Ms. Lofgren, there really is not. You know, we share your concern on the children issue, and we have several efforts that we're doing to assist those children when they're in our immigration courts, particularly a project in Arizona that we could talk about. But on that particular case, I have no—nothing that I can add. It doesn't—while—I don't even know whether they have been in our courts or not.

Ms. LOFGREN. Well, they have, and I see that my time is up, but I would ask, if you could, consistent with whatever requirements you're obliged to respect, if you could give me a report on just why these Boy Scouts are still locked up when they're seeking asylum? I'm very troubled.

Mr. ROONEY. We'll certainly give you what we can on that.

Ms. LOFGREN. I would appreciate that very much.

Mr. GEKAS. We thank the lady, and the Chair now takes the prerogative of asking unanimous consent to put—place into the record a statement by the ABA, the American Bar Association, on this question. Without objection, I offer that for the record.

[The information referred to follows:]

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Pursuing Justice

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February 6, 2002

Rep. George W. Gekas
Chair, Subcommittee on Immigration and Claims
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20510

Dear Mr. Chairman:

The American Bar Association is keenly interested in the quality of the American system of justice, including the rules of practice before the immigration courts and Board of Immigration Appeals. Decisions in the immigration context often have profound implications for American citizens as well as for noncitizens.

Access to fair hearings before impartial administrative immigration judges and independent administrative and appellate court review is vital for providing due process and diminishing the opportunity for arbitrary decisions. A desire to improve the fairness of decisionmaking in immigration cases led to significant reforms in 1983 when the Board of Immigration Appeals and Executive Office for Immigration Review were combined into one agency within the Department of Justice, separate from the Immigration and Naturalization Service. Since that time, the immigration law has been amended on numerous occasions, the corps of immigration judges has been enlarged, and the caseload of both the immigration courts and Board of Immigration Appeals has continued to grow.

While this Subcommittee was organizing this oversight hearing, the Department of Justice and the National Association of Immigration Judges were, independent of each other, also examining aspects of the functioning of the Executive Office for Immigration Review. The ABA has not yet had the opportunity to analyze fully the proposals of each group; however, we care a great deal about the operations of the immigration court system and how well it dispenses justice to the unique and often vulnerable population of noncitizens who seek justice before it. We have many concerns regarding how the Department's proposal would impact the independence of the judiciary and the efficiency of immigration court system.

It is important to recall that the immigration laws under which cases come before the Board have dramatically changed since 1996, and in many significant ways. The Board's primary functions are to provide guidance to immigration judges below through the interpretation of the law; to assure uniformity and consistency of decisions

rendered by the 200-plus immigration judge corps; and to assure the correctness of the results in individual cases. In addition to these objectives, the Board faces the challenge of providing timely review of all appealed decisions with limited resources. The DOJ proposal to reduce the number of Board members strikes us as an unusual approach, because the impetus for reform is the burgeoning caseload. When the INS asylum backlog grew to the hundreds of thousands in the 1990's, the Department increased personnel and accelerated processing of the newest cases while working through the older ones. This appears to have been a successful recipe for dealing with a staggering backlog and may be a better approach for the Board to consider.

Nearly all of the cases before the Board involve individuals who are not familiar with U.S. laws or our judicial system, and who often do not speak English. A significant portion of these cases, moreover, involve indigent individuals with little education who have no legal assistance and represented themselves below in an adversarial proceeding where the government was represented by an experienced trial lawyer. At the same time, the interests at stake for these individuals are great – the potential separation of family and loss of all that makes life worth living. In this context, the quality of the administrative appeal is crucial.

Despite the stakes involved with immigration cases, there is only one administrative evidentiary hearing before the case reaches the Board. In an overwhelming majority of appeals, the Board is the court of last resort and its decision is final. This can be true for a number of reasons: the parties accept the Board's decision; there is statutorily no opportunity for review beyond the Board; or the parties lack the resources to pursue judicial review, when available.

We have concerns that the combination of changes proposed, including accelerated and simultaneous briefing schedule, single member review and summary dismissal, may amount to a denial of review. We recognize the Board's burgeoning caseload and administrative burdens and we share this subcommittee's desire to increase the Board's efficiency. However, we do not believe that the answer is to integrate the Board and/or immigration judge corps into the INS. The separation of the immigration judges from the INS in the 1980s immeasurably improved the quality of the immigration court system.

Since we have concerns about the Department's current plan, we urge the Department to refrain from moving forward with this approach. While it is a good place to begin discussion, we suggest that the Department convene a process to bring together the interested constituencies to examine alternative approaches and models for administrative review. We offer our assistance in crafting a more appropriate solution while preserving due process.

Thank you for consideration of these views.

Sincerely,

Robert D Evans

Robert D. Evans

Mr. GEKAS. And then recognize the lady from Texas for similar acknowledgement.

Ms. JACKSON LEE. Thank you, Mr. Chairman. I ask unanimous consent to put the Department of Justice press release for immediate release, Wednesday, January 26, 2002, from the Attorney General's Office. And particularly cite in that press statement, the words, the sentence, "Today's announced reorganization of the Board of Immigration Appeals will meet these objectives while protecting due process," said Ashcroft. I ask unanimous consent to put this—submit this into record.

Mr. GEKAS. Without objection.

[The information referred to follows:]

Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, FEBRUARY 6, 2002
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DEPARTMENT OF JUSTICE UNVEILS ADMINISTRATIVE RULE CHANGE TO BOARD OF IMMIGRATION APPEALS IN ORDER TO ELIMINATE MASSIVE BACKLOG OF MORE THAN 56,000 CASES

WASHINGTON, D.C. - - Attorney General John Ashcroft unveiled plans today to issue new regulations that will expedite the review of cases before the Board of Immigration Appeals (BIA). The administrative rule change will eliminate the backlog of more than 56,000 immigration cases pending before the BIA, remove unwarranted delays, and utilize the resources of the BIA more efficiently.

"A mission of the Department of Justice is enforcing our immigration laws fairly, deliberately, and without delay. Today's announced reorganization of the Board of Immigration Appeals will meet these objectives while protecting due process," said Ashcroft. "Justice delayed is justice denied. When it takes several years to render a decision, justice is not only denied, it is also derailed."

Under the rule change all immigration appeals will be sent to a screening panel of individual board members who may review the cases and render decisions in relatively simple matters. If a case presents an issue that requires the resources and attention of a three-member panel, the board member will send it on to the larger panel.

The proposed rules provide specific guidance regarding the cases that will be appropriate for three-member review including:

- Settling inconsistencies between the rulings of different Immigration Judges.
- Resolving ambiguities in immigration law.
- Deciding appeals involving matters of national importance.
- Correcting decisions that are not plainly in conformity with the law; and,
- Correcting a factual determination that is clearly erroneous.

The proposed rule eliminates the BIA's *de novo* review of factual issues. The BIA will accept the factual findings of the immigration judges, disturbing them only if they are "clearly erroneous." Accordingly, the proposed rule also prohibits the introduction and consideration of new evidence in proceedings before the BIA.

The proposed administrative rule change also establishes stricter guidelines for filing and deciding appeals. An immigration judge on the screening panel will have 90 days in which to decide a case or refer the matter to a three-member panel. The BIA three-member panel will have 180 days to review and render their decision.

The administrative rule change will save approximately $10 to $30 million that could be applied to reduce backlogs in the processing of immigration applications. In addition, the proposal addresses the BIA's inability to efficiently decide immigration appeals many of which have been pending for years.

The administrative rule change includes a six month transition period to apply the new rule to pending and new cases.

The interim regulation will be published in the Federal Register next week and is expected to become effective in April.

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Mr. GEKAS. Without objection, the record——

Mr. CONYERS. Mr. Chairman, doesn't anyone want to put in the hottest statement from the Department of Justice on this subject into the record?

Mr. GEKAS. You may offer it. I don't have any objection. I'll offer it for you, the entire statement and—by the Department of Justice——

Ms. JACKSON LEE. No, that's just what I put in, Mr. Chairman.

Mr. GEKAS. Well, that's what I thought.

Mr. CONYERS. I thought you excerpted it.

Ms. JACKSON LEE. No. I said "highlighting." I said I want the entire statement in.

Mr. GEKAS. Well, I want to highlight your highlights. [Laughter.]

Ms. JACKSON LEE. So highlight it any way you so desire. It is in, Mr. Ranking Member.

Mr. GEKAS. I ask unanimous consent that the record remain open so that Members of the Committee can send written questions to members of the panel, if they'll acquiesce to answering them. And without any further ado, this hearing is adjourned.

[Whereupon, at 3:38 p.m., the Subcommittee was adjourned.]

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

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American Civil Liberties Union

Testimony at an Oversight Hearing on Operations of the Executive Office for Immigration Review (EOIR)

Before the Subcommittee on Immigration and Claims of the House Judiciary Committee

Submitted by Timothy H. Edgar, Legislative Counsel

February 5, 2002

American Civil Liberties Union
Testimony at an Oversight Hearing on Operations
of the Executive Office for Immigration Review (EOIR)
Before the Subcommittee on Immigration and Claims
of the House Judiciary Committee
Submitted by Timothy H. Edgar, Legislative Counsel
February 5, 2002

Mr. Chairman, Representative Jackson-Lee and members of the Subcommittee:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan, non-profit organization with approximately 300,000 members dedicated to preserving our freedoms as set forth in the Constitution and the Bill of Rights, we welcome this important oversight hearing. Since the organization's founding in 1920, the ACLU has been steadfast in defending the rights of everyone in America, both citizens and immigrants.

We are deeply alarmed at a number of actions taken by the Attorney General in recent months. These actions share a common theme of undermining the independence and authority of the Executive Office of Immigration Review (EOIR), the independent agency within the Department of Justice which handles immigration adjudications, including detention, removal and asylum cases. Reportedly, the Attorney General's "top aides have privately told the immigration review office that he wants the judges 'on the same page' as the rest of the Justice Department."[1] This attitude is precisely the opposite of what should be expected of a fair review process, whether administrative or judicial.

Proposed changes to the Board of Immigration Appeals (BIA), the highest administrative appeals body for immigrants facing detention and removal, represents the latest assault on due process. We believe these changes will not resolve backlog problems while undermining due process. Congress should urge the Attorney General to abandon this ill-advised BIA scheme, and instead work with interested groups to ensure that any restructuring plan for the Immigration and Naturalization Service (INS), whether legislative or administrative, enhances, rather than diminishes, the independence, authority and impartiality of the EOIR.

The EOIR is the frontline agency within the Department of Justice with responsibility for ensuring respect for the due process rights of immigrants facing detention and removal by the INS. EOIR's professional corps of over 200 Immigration Judges conduct hearings that involve critically important issues and may represent life or death decisions for the individual.

The EOIR's Board of Immigration Appeals (BIA) ensures a sober second look at Immigration Judge decisions, establishes precedents for the Department, and provides guidance for the federal courts on the proper interpretation of complex immigration laws and regulations. Since Congress restricted judicial review of many immigration decisions

[1] Lisa Getter, *Immigration Judges Call for Independent Court*, L.A. Times, Jan. 31, 2002, at A1.

in 1996, in many instances, the BIA is the "court" of last resort and remains the only meaningful check on arbitrary or unlawful action by the INS.

Attorney General Ashcroft's proposed changes to the BIA to "streamline" the administrative appeals process will not solve backlog problems, will diminish due process, and will result, in many instances, in an outright denial of review. Together with a number of other organizations, we have urged the Attorney General not to go forward with the regulation and instead meet with affected groups to explore ways to improve the administrative process without diminishing due process. At the very least, we urge the Attorney General to subject the proposed regulation to the customary 60-day public comment period.[2]

At bottom, the proposal represents another step in a fundamental assault on the basic checks and balance that are critical to ensuring respect for the rule of law. Article III of the Constitution ultimately entrusts the federal courts with final authority to interpret the Constitution and laws of the United States. Nevertheless, the modern administrative state relies on a host of regulatory agencies and administrative review procedures to do the day-to-day work of administering the laws of our complex society. Among these agencies is the EOIR.

Of course, the EOIR is an agency within the Executive Branch, under the authority of the Attorney General. It cannot hear constitutional claims and cannot be a substitute for the Article III federal courts. Nevertheless, the EOIR does provide an administrative check on INS actions. It functions independently of the INS and its adjudicators strive to administer impartial justice in immigration matters. Although its decisions can be reversed by the Attorney General, his review authority is exercised only rarely.

Respect for the EOIR's role is essential to ensuring that the Due Process Clause's promise of fairness for immigrants is fulfilled. As the Supreme Court affirmed again last year, "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[3] Especially in a time of crisis, an effective and impartial EOIR is essential to assuring public confidence in the fairness of the immigration detention and removal system.

Moreover, a robust, independent administrative review body is essential to the smooth functioning of the immigration system. When the INS overreaches in its administration of the immigration laws, independent review by the EOIR is vital to provide guidance to the agency. Such guidance can minimize litigation and avoid the disruption that may occur if the federal courts eventually rule against the INS position on a disputed issue of law. Indeed, an overly aggressive interpretation of the 1996 laws, which was rejected last summer by the Supreme Court, is responsible for a significant portion of the current backlog, which is discusssed below.

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[2] A letter to the Attorney General, signed by the ACLU and other organizations, is attached at the end of this testimony.

[3] *Zadvydas* v. *Davis*, 121 S. Ct. 2491, 2500 (2001).

Rather than accede to administration proposals that will undermine the authority and independence of the BIA, without providing greater efficiency and even diminishing the resources needed to clear the backlog, Congress should urge the Attorney General to shelve this misguided proposal. Instead, Congress should work with the administration and affected constituencies to make sure that restructuring of the INS enhances, rather than diminishes, the independence and authority of the EOIR while providing sufficient resources to ensure timely and fair adjudications.

BIA "Streamling" Proposal: An Assault on Checks and Balances

The ACLU is deeply concerned that Attorney General Ashcroft's proposal to further "streamline" the administrative appeals process represents an assault on the basic checks and balances that keep government actions within the boundaries of the law and the Constitution. Major changes include the following:

- Making review by a single BIA member with power to summarily dismiss appeals the norm, not the exception;
- Eliminating altogether de novo review of factual issues and consideration of new evidence, a power which is used sparing today by the BIA in order to guard against injustice and, in asylum cases, address changed country conditions;
- Imposing strict time limits for BIA decisions; if time limits are not met, the appeal will be automatically dismissed and the decision of the Immigration Judge will become final; and
- Eliminating more than half of the BIA's current membership during a 180-day "transition period," with no stated criteria for determining which Board members are to be dismissed.

Taken together, the effect of proposed changes to the BIA will be to seriously diminish its independence and erode its review authority.

The proposal to dramatically expand the number and types of cases that can be decided by a single member of the BIA under a "streamlining" process will inevitably result in pressure to rubber-stamp erroneous decisions. Decisions affirmed without critical debate will not only result in injustice in that particular case but will also frustrate the goal of more timely adjudication. Federal courts are far more likely to overturn decisions that have not been subject to more than cursory review.

Likewise, the proposal to greatly narrow the BIA's scope of review will likely result in less efficient, not more efficient adjudication. The proposal ignores the important difference between formal court proceedings and immigration hearings. Immigration hearings are conducted in accordance with more informal procedures and often involve unrepresented parties. Typically, such hearings result in an oral decision by an Immigration Judge. Occasionally, the Immigration Judge will get the facts wrong. In addition, asylum claims and some other forms of relief from removal may turn on

country conditions, which can change rapidly and unpredictably. Without the ability to conduct de novo review of factual issues and to take additional evidence, the BIA will have to remand such cases to an immigration judge, resulting in additional, unnecessary proceedings -- and further delays.

Mechanical time limits for decisions by the BIA will result in arbitrarily dismissing appeals. Of course, there is no doubt that backlogs remain a serious problem at the BIA, and delays are common. It is said that justice delayed is justice denied. The proposed changes "solve" this problem by providing that justice delayed automatically becomes justice denied. Automatic time limits for decisions by the BIA will have the perverse effect of punishing the appellant for the inaction of the BIA, while rewarding dilatory BIA members with a reduced workload. Reducing the BIA backlog requires additional resources, not summary and mechanical dismissal of the appeals of those who have waited the longest to receive a decision on their appeals. While arbitrarily dismissing appeals will, by definition, result in fewer cases pending before the BIA, it will also likely result in a rise in federal court filings and remands to the BIA if courts decide the agency did not adequately consider the issues in the case.

Perhaps most troubling, the Attorney General's proposal effectively to eliminate almost half the BIA, with no stated objective criteria for determining who is to be eliminated, raises the specter of politically and ideologically-minded dismissals that will quell independent and thoughtful legal analysis. This proposal is reminiscent of President Roosevelt's disastrous attempt to obtain legislation to increase the number of Supreme Court justices and then add new appointees who would be more friendly to his New Deal policies. Roosevelt's court packing scheme, while unquestionably within his authority, was rightly seen as an assault on judicial independence. Ashcroft's BIA proposal, which could be dubbed a court *unpacking* scheme, suffers similar flaws.

EOIR's Role in Protecting Due Process: Towards Greater Independence

The Supreme Court has squarely held that decisions about detention and removal of immigrants implicate fundamental liberty interests protected by the Constitution.[4] The Court has also held, time and time again, that fair hearings before an impartial adjudicator are an essential component of due process in detention and removal cases.[5] The history of immigration adjudication is a history of ever-increasing independence, and, as a result, ever-increasing respect for the decisions of the adjudicators. The Attorney General's proposal would be a step back.

Prior to 1940, the immigration service was located within the Department of Labor. At that time, the decisions of what was then called the Board of Review were merely recommendations to the Secretary of Labor, who made the ultimate decisions. After the immigration service was relocated to the Department of Justice, a Board of Immigration

[4] As to detention, see *Zadvydas*, *supra*, at 2498 ("Freedom from imprisonment--from government custody, detention, or other forms of physical restraint--lies at the heart of the liberty that [the Due Process] Clause protects.") As to deportation, see *INS v. St. Cyr*, 121 S. Ct. 2271, 2279 (2001) ("[S]ome 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'")

[5] *See, e.g.*, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 268 (1954).

Appeals was established with the authority to make final decisions, although these decisions were and are subject to potential review by the Attorney General. Finally, in 1983, the entire corps of Immigration Judges was moved out of the INS into a separate, independent agency which, together with the Board of Immigration Appeals, comprises today's EOIR.

Questions have been raised concerning the impartiality and independence of EOIR. It remains an agency within the Department of Justice. Its decisions are ultimately subject to review by the Attorney General. Nevertheless, the trend has been towards greater independence. The proposed changes to the BIA would reverse that trend, just at the moment when the due process rights of immigrants in detention and removal cases are most at risk.

The Government's Detention Campaign: A Major Challenge for Due Process

Following the terrorist attacks of September 11, 2001, the Department of Justice has undertaken a massive, secretive effort to arrest and detain non-citizens in the United States, mostly of Arab or Muslim background. The number of arrests quickly grew to over 1,200, with hundreds still in detention. Serious questions have been raised about whether the rights of those who have been detained in this effort have been and are being respected. A number of organizations, including the ACLU, have filed a civil action under the Freedom of Information Act (FOIA), requesting basic information about the Department's detention campaign.

Information obtained as a result of that lawsuit shows that, despite the government's assurances to the contrary, detainees' rights have not been respected. Rather, hundreds languished in jail for weeks, and even months, without being formally charged and without adequate access to counsel or family members. Documents obtained in the lawsuit suggest that hundreds of individuals may have already been determined by the Justice Department not to have any connection with terrorism or any information of interest to anti-terrorism investigators, and yet remain in detention.

Whatever one's view of the wisdom or constitutionality of these actions, there is no doubt that the Justice Department's aggressive detention campaign has raised serious and legitimate public concerns, particularly in the Arab and Muslim community, and has provoked anxiety among many immigrants concerning what may happen to them. The knowledge that a fair and impartial adjudicator will hear cases concerning custody, bond, and deportation, *and that those decisions will be a meaningful check on the INS*, is critical to allaying such fears.

Sidelining Immigration Judges and the BIA

Unfortunately, also in recent months, the Department of Justice has implemented a number of directives, policy changes, and new regulations that have eroded due process. A number of these policy changes have the effect of sidelining immigration judges just as their role has become more important than ever. These actions include:

- New regulations allowing individuals to be detained for an unspecified "reasonable time," without charges being brought before an Immigration Judge.[6] In recent months, a "reasonable time" has been interpreted by the Department to be as long as weeks or months,[7] despite the Constitution's general requirement that charges must be filed within 48 hours[8] and despite Congress's decision to limit detention without charge even for suspected terrorists to no more than seven days;[9]

- A secret mandate to Immigration Judges to close all immigration hearings at the request of the INS whenever security is invoked, without any individual findings by an Immigration Judge that closure is warranted or necessary;[10]

- A coordinated effort to use generalized affidavits to oppose the release of individuals who pose no risk of flight and no danger to the community on the vague grounds of security, without providing any specific information to the Immigration Judge or the BIA justifying those claims;[11] and

- New regulations permitting the INS to obtain an automatic stay of orders of Immigration Judges or the BIA to release an individual from detention,[12] effectively nullifying release orders by Immigration Judges and the BIA whenever the INS disagrees with them.

The new regulations, policy directives, and other actions fit a disturbing pattern, viewing judges as obstacles, not partners, in the nation's struggle against terrorism.

A Strong and Independent EOIR: Now More than Ever

Instead of sidelining the immigration judges and the BIA within the EOIR, Congress should examine ways to strengthen the independence of the EOIR. A strong and independent EOIR is needed to correct abuses, hold the government to its promises of respecting detainees' rights, carefully and independently examine any new legal issues that arise in this time of crisis, and ensure public confidence that the Department's actions are within its authority.

Indeed, the EOIR has already played a crucial role in protecting the rights of innocent persons who were mistakenly detained in the wake of September 11. One such person, Ali Al-Maqtari, was arrested shortly after September 11 as he drove his wife, an American citizen and a member of the Armed Forces, to a military base in Fort

[6] 66 Fed. Reg. 48334, 48335 (amending 8 C.F.R. § 237.3(d)).
[7] Dan Eggen, *Delays Cited In Charging Detainees; With Legal Latitude, INS Sometimes Took Weeks*, Washington Post, Jan. 15, 2002, at A1.
[8] *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991)
[9] USA PATRIOT Act, Pub. L. No. 107-56, at § 412 (adding new section 236A to the Immigration and Naturalization Act).
[10] Hanna Rosin, *Lawsuit Filed Over Immigration Hearings' Closing*, Washington Post, Jan. 31, 2002.
[11] *A Deliberate Strategy of Disruption*, The Washington Post, Nov. 4, 2001, at A1.
[12] 66 Fed. Reg. 54909 (Oct. 31, 2001), amending 8 C.F.R. § 3.19(i).

Campbell, Kentucky. Mr. Al-Maqtari was held for almost eight weeks, even though he had applied for adjustment of status because of his marriage and there was no evidence he had any connection to terrorism.[13] As in the cases of hundreds of other detainees, the INS opposed Mr. Al-Maqtari's release on bond by relying on generalized assertions that he may have information relevant to the investigation. The INS advanced a novel theory that would permit continued detention for intelligence-gathering reasons even of wholly innocent persons who pose no risk of flight and no danger to the community. That theory was rejected by an Immigration Judge and by the Board of Immigration Appeals, and Mr. Al-Maqtari was released.[14]

The EOIR's independence allowed it to calmly and thoughtfully address the government's novel claim of authority to detain wholly innocent persons. Ultimately, the EOIR determined that such a power was not consistent with the immigration laws and with our American traditions. As Mr. Al-Maqtari later said, in testimony before the Senate Judiciary Committee, "Thanks to the fairness of your immigration courts and appeal system . . . my story has a good ending."[15]

Yet without that sober second look, Mr. Al-Maqtari and many more innocent persons could face imprisonment without any effective recourse. We must remember that such vague fears, not linked to any specific evidence of wrongdoing, were largely responsible for the shameful decision of the United States government to intern hundreds of thousands of Japanese-Americans, German-Americans and others, both citizens and immigrants, solely on the basis of their race or nationality. Independent review of detention decisions is essential to preventing similar abuses from ever recurring.

Failing to Learn the Lessons of the Past: INS v. St. Cyr

Finally, the Attorney General's proposal ignores an important lesson of the past six years. A substantial portion of the current backlog at the EOIR is the result of an overly aggressive, unnecessarily retroactive interpretation of the 1996 immigration laws,[16] which restricted discretionary relief for immigrants convicted of sometimes relatively minor crimes. The BIA held that Congress had not intended to apply these changes retroactively to persons with applications pending before the EOIR. The BIA relied on a number of longstanding rules concerning the interpretation of statutes, including a basic rule that interpretations that result in retroactive impact are disfavored.[17]

Instead of accepting the BIA's well-reasoned decision, then-Attorney General Reno acceded to INS demands to adopt the harshest possible interpretation of the 1996 laws. The Attorney General's decision disrupted pending and even approved applications for

[13] *Senate Judiciary Committee Holds Hearing On Terrorism Suspect Policies*, Dec. 4, 2001 (statement of Ali Al-Maqtari).
[14] *In re Ali Abubakr Ali Al-Maqtari*, File No. A79-516-343 (BIA Oct. 30, 2001).
[15] *Senate Judiciary Committee Holds Hearing On Terrorism Suspect Policies*, Dec. 4, 2001 (statement of Ali Al-Maqtari).
[16] These laws are the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") and the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").
[17] *Matter of Soriano*, 21 I&N Dec. 516 (Int. Dec. BIA June 26, 1996).

discretionary relief, resulted in years of court challenges and left thousands of long-term lawful permanent residents in legal limbo.

Last June, the Supreme Court roundly rejected such retroactive application of the 1996 laws, saying Congress had never intended such an unfair result.[18] According to former Board of Immigration Appeals member Lauren Mathon, the end result has been "hundreds, if not thousands, of remands to the Board and to Immigration Judges." At least some of these proceedings would have been avoided if the INS had not overreached in its earlier interpretation.

Putting greater pressure on the BIA to accede to the INS's sometimes erroneous view of the immigration laws will simply lead to more disruption when the federal courts intervene to correct those errors. Instead, the BIA's decisions should be further shielded from undue pressure from the prosecutorial arm of the immigration system. Such enhanced independence will help minimize such errors and the resulting disruption.

Conclusion

No one questions the need for reform. Backlogs remain a substantial problem in immigration decisions generally, and in immigration adjudications at the EOIR in particular.

Yet the proposed changes to the EOIR appear do not appear likely to result in greater efficiency. Instead, they will deprive the BIA of needed resources and lead to a crushing workload that will result in hasty decisions – or no decision at all. Such a process is far more likely to lead to decisions overturned in federal court and will provoke many more remands, further burdening the EOIR.

More troubling, the proposed changes will erode the authority and independence of the BIA. They represent the latest in a troubling series of actions on the part of a Justice Department that seems to see the EOIR – and judges in general – as an obstacle, not a partner, in our nation's law enforcement efforts. The proposal to eliminate almost half the BIA, which simply makes no sense as a backlog-clearing measure, raises the specter of politically and ideologically motivated dismissals – a modern-day court *unpacking* scheme.

Our nation's immigration judges need more, not less, independence, and they need it now more than ever. In a recent report, the National Association of Immigration Judges (NAIJ) called for complete independence from the Department of Justice through creation of a separate agency or Article I court, like the United States Court of Federal Claims or the Tax Court.[19] In that paper, the NAIJ complained of the public perception,

[18] *INS v. St. Cyr*, 121 S. Ct. 2271 (2001).

[19] These courts are specialized bodies within the Executive Branch which are established pursuant to Congress's authority under Article I of the Constitution, and are sometimes called "legislative courts." Their decisions cannot be overturned by the head of any federal agency but are subject to review by federal courts established under Article III of the Constitution.

which is based at least in part on reality, that decisions by its members are not independent or impartial, and noted that this undermined public confidence in their ability to fairly judge cases -- especially in times of crisis. The paper specifically noted the mandate to close all immigration cases to public scrutiny when directed by the INS. While any specific proposal will require further examination, Congress and the Administration should carefully consider a variety of proposals to enhance independence as one means of assuring public confidence.

In conclusion, we commend the Subcommittee for holding this important oversight hearing. We ask you to urge the Attorney General to reverse course on this ill-advised BIA scheme. Unfortunately, the current proposal is likely to make backlog problems worse, not better, while diminishing the independence and authority of EOIR. Instead, we urge Congress to work with the Administration and affected constituencies to ensure that INS restructuring empowers immigration judges and the BIA to dispense justice, fairly, impartially, and independently, under our immigration laws.

February 11, 2002

The Honorable John Ashcroft
Attorney General
Department of Justice
Tenth Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Ashcroft:

The undersigned organizations write to express our grave concerns about the proposed regulatory changes to the Board of Immigration Appeals (BIA) that you announced on February 6. We take issue with both the substance of these reported changes and the comment period of thirty days that you have reportedly set.

While we support your stated goal of ensuring that the BIA achieve timely and efficient adjudications and backlog reduction, we believe that the Administration's proposal would not successfully address the backlog and case time concerns, and could lead to a diminution of due process. In fact, in combination, the changes proposed may amount to a denial of a review.

Rather than moving forward with this plan, we urge you to bring together interested constituencies to examine and recommend proposals to improve administrative review in a way that will affirm the independence and impartiality of the BIA, facilitate immigrants' access to the BIA, enhance due process, efficiency, accountability, and consistency, and facilitate oversight and review.

At a minimum, we call on you to extend to sixty days the comment period on this proposed regulation. Thirty days offers insufficient time to comment on a complicated issue that has enormous consequences for immigrant communities nationwide.

Sincerely,

National Organizations

American-Arab Anti-Discrimination Committee (ADC)
American Civil Liberties Union
American Immigration Lawyers Association
Hebrew Immigrant Aid Society (HIAS)
Immigration and Refugee Services of America
International Gay and Lesbian Human Rights Commission
Lawyers Committee on Human Rights
League of United Latin American Citizens
Lutheran Immigration and Refugee Service
National Asian Pacific American Legal Consortium
National Association of Latino Elected Officials (NALEO)
National Council of La Raza
National Immigration Forum
National Immigration Law Center
National Immigration Project of the National Lawyer's Guild

Local Organizations

American Civic Association (Binghamton, New York)
Asian American Legal Defense and Education Fund (New York, New York)
Asian Law Caucus (San Francisco, California)
Asian Pacific American Legal Center (Los Angeles, California)
Association of Haitian Women (Boston, Massachusetts)
Boston Center for Refugee Health & Human Rights (Boston, Massachusetts)
Capital Area Immigrants' Rights (CAIR) Coalition (Washington, D.C.)
Catholic Charities Immigration Counseling Services (Dallas, Texas)
Catholic Charities Immigration Services (Portland, Oregon)
Catholic Charities Refugee and Immigrant Services of San Diego (San Diego, California)
Center for Human Rights Advocacy (Boulder, Colorado)
Detention Resources Project (Philadelphia, Pennsylvania)
Diocesan Migrant & Refugee Services, Inc. (El Paso, Texas)
Erie County Bar Association, Volunteer Lawyers Project (Buffalo, New York)
Florence Immigrant and Refugee Rights Project (Florence, Arizona)
Golden Vision Foundation (York, Pennsylvania)
HIAS and Central Migration Service of Philadelphia (Philadelphia, Pennsylvania)
Immigrant Legal Resource Center (San Francisco, California)
International Institute of Boston (Boston, Massachusetts)
International Institute of Buffalo, NY (Buffalo, New York)
International Institute of Connecticut (Bridgeport, Connecticut)
International Institute of Los Angeles (Los Angeles, California)
International Institute of New Jersey (Jersey City, New Jersey)
International Institute of Rhode Island (Providence, Rhode Island)
International Institute of San Francisco (San Francisco, California)
Las Americas Immigrant Advocacy Center (El Paso, Texas)
Massachusetts Immigrant and Refugee Advocacy Coalition
Minnesota Advocates for Human Rights (Minneapolis, Minnesota)
Nationalities Service Center of Philadelphia (Philadelphia, Pennsylvania)
Northwest Immigrant Rights Project (Granger, Washington)
Northwest Immigrant Rights Project (Seattle, Washington)
Political Asylum/Immigration Representation Project (Boston, Massachusetts)
Refugio del Rio Grande, Inc. (San Benito, Texas)
South Texas Immigration Council, Inc. (Harlingen, Texas)
Vermont Refugee Resettlement Program (Colchester, Vermont)
Washington Lawyers Committee for Civil Rights and Urban Affairs (Washington, D.C.)
Whitman-Walker Clinic Legal Services (Washington, D.C.)
YMCA International Services (Houston, Texas)